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In The
Supreme Court of the United States

EDISON ELECTRIC INSTITUTE; AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; AMERICAN WIND ENERGY ASSOCIATION; ALLEGHENY POWER; TRANS-ALLEGHENY INTERSTATE LINE CO.; AND SAN DIEGO GAS & ELECTRIC CO.,
Petitioners,

v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Concerned that states' refusals to approve proposals to construct and modify electric transmission lines was threatening the capacity, reliability, and security of our Nation's electric grid, Congress expanded the powers of the Federal Energy Regulatory Commission (FERC) in comprehensive landmark energy legislation known as the Energy Policy Act of 2005. As is relevant here, that Act added Section 216 to the Federal Power Act (codified at 16 U.S.C. § 824p), giving FERC the authority to issue permits for the construction or modification of electric transmission facilities in "National Interest Electric Transmission Corridors" whenever a state commission lacks the authority to issue a permit or to consider the interstate benefits of proposed facilities; attaches conditions that render a permit ineffective at reducing congestion or economically infeasible; or has "withheld approval for more than 1 year after the filing of an application" for a permit.

The question presented is whether – consistent with FERC's conclusion through notice-and-comment rulemaking – the phrase "withheld approval for more than 1 year" gives FERC the authority to issue permits to construct or modify transmission facilities in National Interest Corridors not only when state commissions fail to act on applications, but also when they deny them.

PARTIES TO THE PROCEEDINGS

The petitioners in the consolidated cases in the Fourth Circuit were Piedmont Environmental Council, Communities Against Regional Interconnect, Public Service Commission of the State of New York, and Minnesota Public Utilities Commission. These entities are respondents here.

FERC was the respondent in the Fourth Circuit.

Intervenor-respondents in the Fourth Circuit included Edison Electric Institute, American Public Power Association, National Rural Electric Cooperative Association, American Wind Energy Association, Allegheny Power, Trans-Allegheny Interstate Line Co., and San Diego Gas & Electric Co. These entities are petitioners here. PPL Electric Utilities Corp. and Southern California Edison Company, members of petitioner Edison Electric Institute, were also individual intervenor-respondents in the Fourth Circuit, but do not petition in their own names here.

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6, the parties who are petitioners state as follows:

Edison Electric Institute, American Public Power Association, American Wind Energy Association, and National Rural Electric Cooperative Association are non-governmental, incorporated national trade associations. None of the four

associations has parent companies or publicly held stock.

Allegheny Power is the trade name for Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company, all of which are wholly owned subsidiaries of Allegheny Energy, Inc., a publicly held Maryland corporation. No other publicly held company owns 10% or more of the stock of any of the Allegheny Power companies.

Trans-Allegheny Interstate Line Company (TrAILCo) is a wholly owned subsidiary of Allegheny Energy Transmission, LLC, which is a wholly owned subsidiary of Allegheny Energy Inc. No other publicly held company owns 10% or more of TrAILCo stock.

San Diego Gas & Electric Company (SDG&E) is a subsidiary of Enova Corporation, which in turn is a wholly owned subsidiary of Sempra Energy, a publicly held California corporation. No other publicly held company owns 10% or more of SDG&E stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Edison Electric Institute, American Public Power Association, National Rural Electric Cooperative Association, American Wind Energy Association, San Diego Gas & Electric Company, Allegheny Power, and Trans-Allegheny Interstate Line Company respectfully petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion (App. 1a) is reported at 558 F.3d 304. The pertinent FERC order (App. 52a) and order denying rehearing (App. 246a) are reported, respectively, at 71 Fed. Reg. 69,440 (2006) and 119 FERC ¶ 61,154 (2007).

JURISDICTION

The Fourth Circuit issued its opinion on February 18, 2009. App. 1a. Applicants and FERC filed timely petitions for rehearing en banc, which that court denied on April 20, 2009. App. 50a. By means of orders entered July 13 and August 7, 2009, Chief Justice Roberts extended the time to file this Petition for Writ of Certiorari up to and including September 17, 2009. *See* 09-A46. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

This case involves Section 1221 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594

(2005), codified in relevant part as Section 216 of the Federal Power Act, 16 U.S.C. § 824p ("Section 216"). Regulations implementing the relevant portion of Section 216 are codified at 18 C.F.R. § 50.6(e)(3)(i). These provisions are set forth in App. 293a and 308a.

STATEMENT OF THE CASE

Prior to 2005, state governments held the exclusive authority to grant permits for the construction of electric transmission lines within their jurisdiction. Faced, however, with a national demand for electricity that was quickly outpacing construction of new transmission lines, Congress took several steps in the Energy Policy Act of 2005 ("EPAct 2005" or "the Act") to ensure that our Nation's grid would have sufficient capacity, security, and reliability to support twenty-first century requirements. To that end, EPAct 2005 added Section 216 to the Federal Power Act, giving FERC the authority to issue permits for the construction or modification of electric transmission facilities in "National Interest Electric Transmission Corridors" whenever a state commission lacks the authority to issue a permit or to consider interstate benefits of the facilities, attaches conditions that render a permit ineffective at reducing congestion or economically infeasible, or – as is most relevant here – has "withheld approval for more than 1 year after the filing of an application" for a permit. FERC issued rules construing that "federal backstop" provision as giving the Commission the power to issue permits when state entities failed to act on applications or simply denied them. But a divided

Fourth Circuit invalidated the rules in part, holding that construing the phrase "withheld approval" to include denials contravened the plain language of EPAct 2005.

1. Background for EPAct 2005. During the first part of the twentieth century, most electric systems were confined to state-franchised service territories where one utility company was given the exclusive rights to generate, deliver, and sell electricity. Most of these systems were intrastate in nature and served somewhat limited geographic areas, with transmission links to other such systems that were used for exchanging power reserves. *See New York v. FERC*, 535 U.S. 1, 5 (2002).

In 1935, Congress ushered in our modern system of federal energy regulation. In Part II of the Federal Power Act in 1935, 16 U.S.C. § 824 *et seq.*, Congress gave FERC jurisdiction to regulate the transmission and sales of electric energy in interstate commerce. While this Act allowed FERC to regulate some areas that were previously under exclusive state control, *see New York*, 535 U.S. at 6, it did not give FERC authority over the States with respect to granting siting permission for transmission lines.

Beginning in 1978, Congress enacted a second wave of legislation aimed at ensuring the availability of reasonably priced electricity and increasing accessibility to nontraditional sources of electric energy. This legislation increased competition in electric markets in part by allowing some customers to choose their own power suppliers, which might be

far removed geographically from the points of consumption. This legislation, combined with complementary FERC actions, improved technology, and the ordinary forces of economic expansion, increased the power flow over the Nation's power lines at a great pace. This, in turn, accelerated demand for long interstate transmission lines to link the sources of power with load centers where it was consumed. *New York*, 535 U.S. at 7-9.

As years passed, however, and as state governments continued to retain exclusive authority (subject only to minor exceptions) to issue permits for the construction of transmission lines, it became increasingly apparent to many experts and governmental entities that the construction of transmission lines was not keeping up with demand and that this situation represented a serious problem. *See, e.g.*, U.S. Dep't of Energy, *National Transmission Grid Study*, at xi (May 2002). Electric utilities were experiencing lengthy delays in obtaining permits from states to site transmission facilities – a situation often exacerbated by the need to obtain permits from several states. A consensus eventually emerged that in order to "avoid future blackouts" and to provide the U.S. economy with reliable electricity, 150 Cong. Rec. S3732 (daily ed. Apr. 5, 2004), federal legislation was needed to improve procedures for siting and permitting transmission lines and that such legislation "should be implemented immediately." *National Transmission Grid Study* at 58-59.

2. EPAct 2005. Congress enacted EPAct 2005 to address the urgent need for improved siting and permitting procedures – and, ultimately, the mounting need for reliable and reasonably priced electricity in the twenty-first century. Central to this effort was Congress's desire to address the "[s]iting challenges, including lack of coordination among the states, [that] impede[d] improvement of the electric system." S. Rep. No. 109-78, at 8 (2005).

Title XII of the Act is entitled "Electricity." Subtitle B of the Title, entitled "Transmission Infrastructure Modernization," addresses the siting of interstate electric transmission facilities, transmission system finance, and advanced transmission technologies and contains the statutory section at issue in this case.[1] That subtitle added a new Section 216 to the Federal Power Act, codified at 16 U.S.C. § 824p, thereby establishing an integrated program to promote the siting and permitting of critical electric transmission facilities

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[1] Other subtitles of Title XII addressed other critical transmission issues. Subtitle A requires mandatory reliability standards for the nation's electric system; Subtitle C requires nondiscriminatory access to transmission lines, permits federal utility participation in transmission organizations, and protects certain transmission contracts; and Subtitle D requires incentive-based rates for transmission infrastructure to promote reliable and economically efficient transmission, attract new investment, and encourage new interconnection and transmission upgrades. Other sections within other titles of EPAct 2005 also encouraged transmission construction. Section 368, for instance, expedites designation of energy rights-of-way on federal lands, and Section 1308 shortens the depreciation period for transmission facilities.

while taking into account competing political interests in that process.

Section 216 begins by directing the United States Department of Energy to designate as "National Interest Electric Transmission Corridors" critical areas where actions are needed to relieve transmission congestion in interstate commerce and to improve reliability. Among the considerations that the Department shall consider in designating National Interest Corridors are whether "the energy independence of the United States would be served by the designation;" whether "the designation would be in the interest of national energy policy," such as the policy of enhancing domestic, renewable sources of energy; and whether "the designation would enhance national defense and homeland security." 16 U.S.C. §§ 824p(a)(2) & (4).

Section 216(b) of the Federal Power Act then creates what is known as federal backstop siting authority for transmission facilities within these National Interest Corridors. That is, the subsection authorizes FERC, under certain circumstances, to issue construction permits for electric transmission facilities within the corridors. This federal authority arises in three circumstances, the third of which is at issue here: (1) when the state in which the facilities would be located does not have authority to approve the siting of the facilities or to consider the interstate benefits expected to be achieved by the facilities; (2) when the applicant for a state permit would be disqualified by the state because the applicant does not serve end-use customers in the state; or (3) when a state entity has authority to act

on an application, but the state "(i) withheld approval for more than 1 year after the filing of an application" or one year after the National Interest Corridor designation; or a state "(ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible." 16 U.S.C. §§ 824p(b)(1)(A)-(C).

3. FERC's Rules Implementing Section 216. Shortly after the enactment of EPAct 2005, the Department of Energy designated two National Interest Corridors. The Mid-Atlantic Area National Corridor includes New Jersey and the District of Columbia, as well as parts of New York, Pennsylvania, Maryland, Virginia and West Virginia. The Southwest Area National Corridor includes parts of California and Arizona. The Department flagged four other "congestion areas of concern" that it is closely monitoring with an eye toward the possibility of designating them as National Interest Corridors as well. U.S. Dep't of Energy, *National Electric Transmission Congestion Report*, 72 Fed. Reg. 56,992, 56,995, 57,027-28 (Oct. 5, 2007), *petition for review filed, The Wilderness Society, et al. v. U.S. Dep't of Energy*, No. 08-71074, *et al.* (9th Cir.).

After notice-and-comment procedures, FERC promulgated regulations implementing Section 216. *See Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, App. 52a. As is relevant here, FERC interpreted the statutory phrase "withheld approval for more than

one year" to include a state's denial of a permit. App. 70a.

A number of parties filed petitions at FERC asking for rehearing, arguing that the "withheld approval" phrase confers federal permitting authority only when a state has failed to issue any decision for more than one year. In response, FERC issued an Order on Rehearing, 119 FERC ¶ 61,154 (2007), reaffirming its position and explaining that interpreting the phrase "withheld approval" to include denials is the most common-sense reading of the statute. App. 252a ¶ 11. FERC also maintained that its interpretation furthered the underlying goals, purpose, and intent of the statute to facilitate siting of needed facilities in National Interest Corridors and was supported by the Act's legislative history. App. 258a-259a ¶ 19-20.

4. Federal Appellate Proceedings. The Federal Power Act affords any party aggrieved by a FERC final order sixty days to file a petition for review in a federal court of appeals challenging that order. 16 U.S.C. § 825*l*(b). Accordingly, as in *New York v. FERC*, 535 U.S. 1, the Public Service Commission of the State of New York timely petitioned for review of FERC's orders regulating electric transmission in the Second Circuit. The Minnesota Public Utilities Commission petitioned for review in the D.C. Circuit. The state commissions argued that FERC's interpretation of Section 216 would fundamentally and immediately alter the way that the commissions carry out their responsibilities for transmission siting because it would render their denials of permits subject to federal review. Communities

Against Regional Interconnect (CARI) and Piedmont Environmental Council (PEC), community interest organizations opposed to at least two applications for transmission lines that are currently pending in the Mid-Atlantic Area National Corridor, also petitioned for review of FERC's rules. CARI filed in the D.C. Circuit, and PEC filed in the Fourth Circuit.

Because the first petition was filed in the Fourth Circuit, the other three petitions were transferred to that court, where all four petitions were consolidated. Sixteen states from across the country filed an *amicus* brief in support of the petitions. The petitioners in this Court – four major trade associations, two utility companies, and a transmission company, who together represent entities that are responsible for generating, transmitting, or distributing most of the electricity consumed in the United States – intervened in support of FERC. In addition, two other utilities, PPL Electric Utilities Corporation and Southern California Edison Company (SCE), both members of petitioner Edison Electric Institute, also intervened. SCE had an application to build a transmission line in the Southwest Area National Corridor denied by the Arizona Corporation Commission after EPAct was enacted. Other petitioners and entities and entities represented by petitioner trade associations have applications to build transmission lines in National Interest Corridors pending right now before state commissions. Still others are planning to file or to support such applications.

A divided panel of the Fourth Circuit invalidated FERC's rules implementing Section 216

to the extent they confer federal backstop authority when a state commission denies a permit. The majority acknowledged that this dispute is governed by the two-step analysis contained in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), under which a court first consults the plain meaning of the statute and defers to the agency's view if the statute is ambiguous. But in the majority's view, the plain meaning of the statutory phrase "withheld approval" is limited to situations in which a state fails to act and thus excludes denials of permits. App. 22a-23a. Finding the language clear, the majority gave no deference to FERC's interpretation under *Chevron*, thus explicitly stopping the *Chevron* analysis at step one of *Chevron's* two-step construct. App. 23a.

Judge Traxler dissented in relevant part, reaching exactly the opposite conclusion concerning the plain meaning of Section 216 and FERC's rule interpreting the section. In Judge Traxler's view, the statutory phrase "withheld approval" "is susceptible to only one interpretation, the one that FERC adopted." App. 38a. That interpretation "yields a straightforward rule that a state has 'withheld approval for more than 1 year' when one year after approval has been sought, the state still has not granted it, regardless of the reason." App. 41a. That interpretation also, in the dissent's view, accords with the statute's purpose of "ensur[ing] that a state does not frustrate the goal of significantly reducing transmission congestion in a national interest corridor." App. 43a. Finally, the dissent asserted that, "even assuming *arguendo* that the statute's meaning were not plain," FERC's

interpretation was at the very least reasonable and thus entitled to deference under *Chevron*. App. 49a.

Both FERC and petitioners sought rehearing en banc, with FERC arguing that the Fourth Circuit's decision "significantly curtails FERC's ability to address critical infrastructure deficiencies in National Interest Corridors." Pet. of Resp't Fed. Energy Regulatory Comm'n for Reh'g En Banc at 3, *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) (No. 07-1651). But the Fourth Circuit denied the petitions without comment.

REASONS FOR GRANTING THE WRIT

I. This Case Involves A Statute That Is Critical To National Energy Policy.

The statutory language at issue in this case is an integral part of major federal legislation aimed at addressing an urgent issue of national significance. Indeed, nothing less than the reliable and secure operation of the Nation's electric grid, and the provision of electricity to millions of Americans, are at stake.

In the years leading up to the EPAct 2005, energy policy experts repeatedly emphasized an increasingly "urgent" problem: American consumers continue to require more and more electricity, and energy producers are working hard to develop the next generation of renewable energy. U.S. Dep't of Energy, *National Transmission Grid Study*, at xi (May 2002). Yet "growth in electricity demand and investment in new generation facilities have not been matched by investment in new transmission

facilities." *Id.*; *see also* H.R. Rep. No. 109-215, at 171 (2005) ("Investment in electric transmission has not kept pace with electricity demand. . . . Legislation is needed to address the issues of transmission capacity, operation and reliability."). Indeed, "[b]illions of dollars need to be invested in the national transmission grid to ensure reliability and to allow markets to function." S. Rep. No. 109-78, at 8 (2005).

The inadequacy of our Nation's electric grid imposes concrete consequences for American consumers – businesses and individuals alike. "Today, congestion in the transmission system impedes economically efficient electricity transactions and in some cases threatens the system's safe and reliable operation." U.S. Dep't of Energy, *Considerations for Transmission Congestion Study and Designation of National Interest Electric Transmission Corridors*, 72 Fed. Reg. 5660 (Feb. 2, 2006). And, according to the electric reliability organization that FERC has certified to ensure the reliability of the country's electric system, "more transmission [is] needed to maintain bulk system reliability and integrate new generation," and "each peak season puts more and more strain on the transmission system." North American Electric Reliability Corp., *2008 Long-Term Reliability Assessment* 15-16 (Oct. 2008); *see also* North American Electric Reliability Corp., *Order Certifying North American Electric Reliability Corp. as the Electric Reliability Organization and Ordering Compliance Filing*, 116 FERC § 61,060 (2006).

EPAct 2005 was created, in the words of Senator Domenici, the Chairman of the Subcommittee on Energy and Natural Resources, "[t]o avoid future blackouts and provide our industry and consumers with the reliable electricity they need." 150 Cong. Rec. S3732 (daily ed. Apr. 5, 2004). After concluding that "[s]iting challenges, including lack of coordination among the states, impede improvement of the electric system," S. Rep. No. 109-78, at 8 (2005), Congress inserted Section 216 into the Act to "streamline the permitting of siting for transmission lines to assure adequate transmission." 150 Cong. Rec. S3732 (daily ed. Apr. 5, 2004) (statement of Sen. Domenici).

"[S]ection 216(a), as well as other provisions of the EPAct, evince concern about the need to strengthen transmission infrastructure throughout the Nation." U.S. Dep't of Energy, *Draft National Interest Electric Transmission Corridor Designations,* 72 Fed. Reg. 25,838, 25,844 (May 7, 2007) (footnote omitted). Section 216 focuses federal oversight on "National Interest Electric Transmission Corridors" – areas that implicate "the energy independence of the United States," "national energy policy," and even "national defense and homeland security." *Id.* at 25,838 (*quoting* 16 U.S.C. 824p §§ (a)(4)(C)-(E)). When a state is unable or unwilling to issue a permit for new transmission facilities within such corridors, Section 216 gives FERC the authority to do so.

II. The Fourth Circuit's Decision Does Violence To The Language Of The Statute And The Context In Which It Occurs.

A state commission that does not want to allow a proposed interstate transmission line to cross its territory has three basic ways to defeat it. The commission can deny the application outright, impose conditions that make the proposal impractical, or delay the permitting process so long that the applicant gives up. The Fourth Circuit did not dispute that Section 216 gives FERC federal backstop authority to prevent local commissions from frustrating proposed projects in the latter two of these three situations – prolonged delays and unreasonable conditions. A majority of the Fourth Circuit, however, held that FERC had no justification for interpreting Section 216 to give it the first (and most obvious) kind of backstop authority – the authority to act when a state has denied an application. FERC lacks such authority, in the Fourth Circuit's view, even if a state's denial is completely unreasonable and thwarts national energy policy.

The majority's analysis cannot withstand scrutiny. Section 216 allows FERC to act when a state commission has "withheld approval for more than 1 year after the filing of an application" for a permit. That phrase is most naturally read – or at least is reasonably read – to include denials as well as failures to act.

A. The Fourth Circuit held the statutory phrase "withheld approval [of an application] for

more than 1 year" plainly cannot encompass a denial of an application. The words "withheld" and "for one year," according to the majority, imply "continuous" action, a concept inconsistent with the "finite act of denying an application within the one-year deadline." App. 17a. According to the Fourth Circuit, therefore, Section 216 grants FERC jurisdiction only to ensure that states make "a timely and straightforward decision on every permit application in a national interest corridor." App. 20a. If a state commission does so, FERC lacks any authority whatsoever, even if the local decision is indefensible based on the evidence presented and completely thwarts national energy policy.

Neither the text nor the purpose of the statute requires such a counterintuitive result. As Judge Traxler noted, "[a]pplying the common meaning of the word 'withhold' yields a straightforward rule that a state has 'withheld approval for more than 1 year' when one year after approval has been sought, the state still has not granted it, regardless of the reason." App. 41a. Put another way, although a denial initially occurs on a discrete day, a state commission that continues to adhere to a denial at the end of a year has withheld – *i.e.*, refused to grant – approval for that year. Just as one might say that this Court "has held for over 50 years that states may not establish 'separate-but-equal' schools," even though the actual holding was a discrete decision in 1954, one can comfortably say that a state commission has "withheld approval for more than 1 year" when the failure to approve stems from a denial of an application on a particular day.

The majority was able to reach the contrary conclusion only by substituting the word "action" for "approval." The Fourth Circuit's opinion states: "The phrase, read as a whole, means that *action* has been held back continuously over a period of time (more than one year)." App. 17a (emphasis added). But withholding "approval" is not the same as withholding "action." If Congress had meant withholding "action" as the trigger for backstop authority, it would have said withholding "action." It did not. It said that withholding "approval" was the trigger. Therefore, a proper reading of the actual words of the statute refutes the meaning that the Fourth Circuit gives them.

Furthermore, "in expounding a statute, [courts should not be] guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). Courts, in other words, must "consult the Act, viewing it as a 'symmetrical and coherent regulatory scheme,'" *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)), with the goal that the statutory scheme remain "coherent and consistent," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

Interpreting "withheld approval" to include denials complements the object and policy of the other provisions of Section 216 and EPAct 2005 generally, while excluding denials thwarts their object and policy and renders the regulatory scheme

incoherent. Section 216(b) indisputably gives FERC siting authority within a National Interest Corridor when a state commission has "conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible." 16 U.S.C. § 824p (b)(1)(C)(ii). It is illogical to assume, as the Fourth Circuit's opinion does, that EPAct 2005 would give FERC the authority to review permits so strenuously encumbered with unreasonable conditions that they are, in effect, a denial of an application, and yet deny the same authority when permits are denied outright. More generally, it is illogical to assume that Congress would have created such a broad loophole in the federal backstop authority deemed essential to ensure that the Nation's energy grid is updated to meet twenty-first century demands.

The Fourth Circuit sought to reconcile this inconsistency by opining that, when a state "imposes project-sinking conditions," the state "misuses its authority," whereas when a state denies a permit, it "acts with transparency and engages in a legitimate use of its traditional powers." App. 21a. Yet, it could be entirely appropriate for a state to condition a project on terms that are economically onerous, depending on the circumstances of the particular proposal. All Section 216 is designed to do is to trigger federal oversight in such situations. Conversely, transparency and traditional powers are little solace when a state unjustifiably thwarts a reasonable and economical proposal to address the national demand for increased electric capacity and

reliability. Section 216, in short, is directed toward reviewing the substance of state permitting decisions in National Interest Corridors, not the procedures that lead to them.

The Fourth Circuit also protested that it would be "futile" for a state commission to do its "normal work" if FERC could override its denial of a permit. App. 20a. To the contrary, state entities retain full authority to decide significant routing and other important conditions in response to siting requests. If routing and conditions that a state commission imposes relieve congestion in a National Interest Corridor and do not render the project economically infeasible, then the state's decision will stand. Further, even if a state denial triggers FERC backstop authority, states have the statutorily-granted opportunity to give input to FERC, *see* 16 U.S.C. § 824p(d), and in fact, FERC could well agree with the state's denial after its rigorous review process. The critical point is that "FERC brings a broader national perspective to siting proposals in national interest electric transmission corridors," and "Congress clearly intended that FERC would be authorized to act from that perspective." App. 45a-46a. (Traxler, J., dissenting).

Finally, what limited legislative history there is supports FERC's interpretation of the statute. The House Report on the bill that became EPAct 2005 explained that applicants may obtain permits from FERC when, after one year, "a state . . . is unable *or refuses* to site the line." H.R. Rep. No. 109-215, at 261 (2005) (emphasis added). Similarly, the Senate Report notes that the bill addresses the "[s]iting

challenges, including lack of coordination among the states," that were preventing needed transmission lines from being constructed. S. Rep. No. 109-78, at 8 (2005). Even the dissenting members to the legislation acknowledged that the siting provisions preempted state decisions about "whether new or expanded lines should be built." H.R. Rep. No. 109-215, at 494.

B. At the very least, FERC's interpretation of Section 216 is a reasonable construction of the phrase "withheld approval." As the Fourth Circuit acknowledged, FERC's interpretation of this statutory phrase, as the result of notice-and-comment rulemaking, is entitled to deference under the principles enunciated in *Chevron,* 467 U.S. 837. App. 16a. Under *Chevron* step one, "[i]f the intent of Congress is clear, that is the end of the matter." 467 U.S. at 842. But if the intent of Congress is ambiguous, the court's inquiry must continue to *Chevron* step two. In that circumstance, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" in charge of implementing the statute. *Id.* at 843.

The upshot of *Chevron* is that an entity challenging the agency's interpretation of a statute must prove that the agency's "interpretation is unreasonable." *National Cable & Telecomms. Ass'n v. Gulf Power*, 534 U.S. 327, 333 (2002); *Verizon Commc'ns, Inc. v. FCC,* 535 U.S. 467, 501, 510-20 (2002). This is an "uphill battle." *See Verizon,* 535 U.S. at 498. The agency's interpretation does not need to be the best, the most reasonable, or even the

most plausible reading of the statute. So long as it is "sufficiently reasonable" to fall within the realm of legitimate constructions of the statute, the agency's reading controls. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (internal citations omitted); *see also Chevron*, 467 U.S. at 843 n.11; *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009).

The Fourth Circuit dissent's well-reasoned analysis of Section 216 – reading the statute directly contrary to the majority – demonstrates that the phrase "withheld approval for more than 1 year" can reasonably (if not definitively) be interpreted as encompassing denials of applications. App. 34a-49a (Traxler, J., dissenting). Such a "collision of viewpoints underscores" that "the text is unclear." *In re Thinking Machines Corp.*, 67 F.3d 1021, 1025 (1st Cir. 1995). Indeed, as Justice (then Judge) Ginsburg noted for the D.C. Circuit, "it would be unusual for a statute free from ambiguity to be subject to different interpretations by . . . a closely divided panel." *Local Union 1261, Dist. 22, United Mine Workers v. Federal Mine Safety & Health Review Comm'n*, 917 F.2d 42, 46 (D.C. Cir. 1990).

This is certainly not such an unusual case. Neither the phrase "withheld approval for more than 1 year" nor any overarching statutory context or purpose clearly renders FERC's and the Fourth Circuit dissent's reading of the statute implausible. To the contrary, interpreting the words "withheld approval" to include denials accords with dictionary definitions of the term "withheld" as "declin[ing] to grant." App. 41a (Traxler, J., dissenting) (quoting

Funk & Wagnalls Standard Dictionary 936 (1980)). And construing the words in that manner best effectuates congressional intent to create federal backstop authority in electric transmission corridors of national significance.

III. Without Review By This Court Now, The Fourth Circuit's Erroneous Interpretation Of this Vital Legislation Will Become The Law Of The Land.

This Court's review of the Fourth Circuit's construction of this important legislation is necessary now. Recognizing the critical need for new transmission lines in certain areas of the country, the Department of Energy has already designated two multistate National Interest Corridors and has indicated that it is considering designating four more. *See* U.S. Dep't of Energy, *National Electric Transmission Congestion Report*, 72 Fed. Reg. 56,992, 56,995 (Oct. 5, 2007). Federal policymakers and industry participants alike need to know whether FERC has true backstop permitting authority in these areas. A utility company must invest millions of dollars, years of time, and substantial staff resources to prepare, present, and pursue a transmission siting application. Many utility companies, therefore, that have been considering filing permit applications are closely watching the outcome of this case. If the Fourth Circuit's decision stands, and state commissions continue to be allowed – as before EPAct 2005 – to deny such applications without triggering any review by a body taking a broader regional or

national perspective, some of these applications may not even be filed.

Not only does the Fourth Circuit's decision nullify a critical element of a new federal law, but there will not be another opportunity for a different court to interpret this significant statute. The Fourth Circuit's interpretation arose on consolidated review of four facial challenges in three courts of appeals to an agency rulemaking. *See* 28 U.S.C. § 2112(a)(5) (providing for consolidation and a single, nationally binding decision whenever petitions are filed in multiple courts challenging the same agency rule). The specific statute in the Federal Power Act that enabled these challenges provides that any court of appeals reviewing the legality of a FERC order shall have the "exclusive" power "to affirm, modify, or set aside such order in whole or in part," and that any judgment setting aside a FERC rule "shall be final, subject [only] to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28." 16 U.S.C. § 825*l*(b). The statute also contains a sixty-day statutory time limit for seeking judicial review. *Id.* That time has now run. Accordingly, no other entity may challenge FERC's interpretation of Section 216, and FERC cannot enforce it anywhere anyway, because the Fourth Circuit has "reverse[d] FERC's interpretation." App. 23a, 33a; *see also Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858-59 (D.C. Cir. 2003).

This Court should not let the Fourth Circuit's decision become the law of the land without at least a full review on the merits. Indeed, this Court has

granted certiorari to review FERC rules governing federal/state jurisdiction over electric transmission issues even when a court of appeals has upheld FERC's new rules. *See New York v. FERC*, 535 U.S. 1 (2002). The situation here, in which a court of appeals has nullified FERC's rules, is even more pressing.

Indeed, this Court regularly has granted certiorari in cases in which federal courts of appeals have invalidated important new regulations implementing federal statutes. In such situations, the usual criterion of a circuit conflict becomes irrelevant. *See, e.g., FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009); *Winter v. Natural Resource Defense Council, Inc.*, 129 S. Ct. 365 (2008); *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004); *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). This case should be no different.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PIEDMONT ENVIRONMENTAL COUNCIL,
Petitioner,

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (NYPSC); MINNESOTA PUBLIC UTILITIES COMMISSION
Intervenors,

v. No. 07-1651

FEDERAL ENERGY REGULATORY COMMISSION;
Respondent,

SOUTHERN CALIFORNIA EDISON COMPANY; ALLEGHENY POWER; TRANS-ALLEGHENY INTERSTATE LINE COMPANY; EDISON ELECTRIC INSTITUTE; AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; AMERICAN WIND ENERGY ASSOCIATION; SAN DIEGO GAS & ELECTRIC COMPANY; PPL ELECTRIC UTILITIES CORPORATION
Intervenors.

STATE OF NEW YORK; STATE OF ARIZONA; STATE OF CALIFORNIA; STATE OF

CONNECTICUT; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF IOWA; STATE OF KENTUCKY; STATE OF NEW HAMPSHIRE; STATE OF OHIO; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF WEST VIRGINIA; STATE OF WYOMING,
Amici Supporting Petitioner.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (NYPSC); PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

v. No. 07-1864

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

SOUTHERN CALIFORNIA EDISON COMPANY; ALLEGHENY POWER; TRANS-ALLEGHENY INTERSTATE LINE COMPANY; EDISON ELECTRIC INSTITUTE; AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; AMERICAN WIND ENERGY ASSOCIATION; SAN DIEGO GAS & ELECTRIC COMPANY,
Intervenors.

STATE OF NEW YORK; STATE OF ARIZONA; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF IOWA; STATE OF KENTUCKY; STATE OF NEW HAMPSHIRE; STATE OF OHIO; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF WEST VIRGINIA; STATE OF WYOMING,
Amici Supporting Petitioners.

MINNESOTA PUBLIC UTILITIES COMMISSION,
Petitioner,

v. No. 07-1865

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

SOUTHERN CALIFORNIA EDISON COMPANY; ALLEGHENY POWER; TRANS-ALLEGHENY INTERSTATE LINE COMPANY; EDISON ELECTRIC INSTITUTE; AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; AMERICAN WIND ENERGY ASSOCIATION; SAN DIEGO GAS & ELECTRIC COMPANY; PPL ELECTRIC UTILITIES CORPORATION,
Intervenors.

STATE OF NEW YORK; STATE OF ARIZONA; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF IOWA; STATE OF KENTUCKY; STATE OF NEW HAMPSHIRE; STATE OF OHIO; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF WEST VIRGINIA; STATE OF WYOMING,

Amici Supporting Petitioner.

COMMUNITIES AGAINST REGIONAL INTERCONNECT,

Petitioner,

v. No. 07-1866

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

ALLEGHENY POWER; TRANS-ALLEGHENY INTERSTATE LINE COMPANY; EDISON ELECTRIC INSTITUTE; AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; AMERICAN WIND ENERGY ASSOCIATION; SAN DIEGO GAS & ELECTRIC COMPANY; PPL ELECTRIC UTILITIES CORPORATION,

Intervenors.

STATE OF NEW YORK; STATE OF ARIZONA; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF IOWA; STATE OF KENTUCKY; STATE OF NEW HAMPSHIRE; STATE OF OHIO; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF WEST VIRGINIA; STATE OF WYOMING,

Amici Supporting Petitioner.

On Petition for Review of an Order of the Federal Energy Regulatory Commission.

(RM06-12-001)

Argued: September 24, 2008

Decided: February 18, 2009

Before MICHAEL and TRAXLER, Circuit Judges, and Richard L. VOORHEES, United States District Judge for the Western District of North Carolina, sitting by designation.

Reversed in part, affirmed in part, vacated in part, dismissed in part without prejudice, and remanded by published opinion. Judge Michael wrote the opinion, in which Judge Voorhees joined. Judge Traxler wrote a separate opinion concurring in part and dissenting in part.

COUNSEL:

ARGUED: Jonathan D. Feinberg, NYS PUBLIC SERVICE COMMISSION, Albany, New York; Belina Anderson, GILBERTI, STINZIANO, HEINTZ & SMITH, P.C., New York, New York, for Petitioners. Robert Harris Solomon, FEDERAL ENERGY REGULATORY COMMISSION, Washington, D.C., for Respondent. Brian R. Gish, DAVIS, WRIGHT & TREMAINE, L.L.P., Washington, D.C., for Intervenors.

ON BRIEF: John W. Montgomery, Jr., MONTGOMERY & SIMPSON, L.L.P., Richmond, Virginia, for Petitioner Piedmont Environmental Council; Peter McGowan, Acting General Counsel to the Public Service Commission of the State of New York, Sean Mullany, Assistant Counsel, NYS PUBLIC SERVICE COMMISSION, Albany, New York, for Petitioners Public Service Commission of the State of New York (NYPSC) and People of the State of New York; Lori Swanson, Attorney General, Kari Zipko, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MINNESOTA, St. Paul, Minnesota, for Petitioner Minnesota Public Utilities Commission. Kevin C. Murphy, Brenda D. Colella, GILBERTI, STINZIANO, HEINTZ & SMITH, P.C., Syracuse, New York, for Petitioner Communities Against Regional Interconnect. Cynthia A. Marlette, General Counsel, Lona T. Perry, Senior Attorney, FEDERAL ENERGY REGULATORY COMMISSION,

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OPINION

MICHAEL, Circuit Judge:

Two state utilities commissions and two community interest organizations petition for review of several rulemaking decisions made by the Federal Energy Regulatory Commission (FERC or the

Commission) in connection with FERC's implementation of the new § 216 of the Federal Power Act (FPA) and the National Environmental Policy Act (NEPA). Section 216 of the FPA, which was added in 2005, gives FERC jurisdiction in certain circumstances to issue permits for the construction or modification of electric transmission facilities in areas designated as national interest corridors by the Secretary of Energy.

Our decision is as follows. First, we reverse FERC's expansive interpretation of the language in FPA § 216(b)(1)(C)(i) that grants FERC permitting jurisdiction when a state commission has "withheld approval [of a permit application] for more than 1 year." The phrase does not include, as FERC held, the denial of an application. Second, we affirm FERC's determination that it was not required to prepare an environmental assessment or an environmental impact statement in connection with its issuance of procedural regulations dealing with the content of permit applications under § 216 of the FPA. Third, we conclude that FERC violated Council on Environmental Quality (CEQ) regulations when it failed to consult with the CEQ before amending its (FERC's) NEPA-implementing regulations to cover § 216 permit applications. We therefore vacate the amendments to the NEPA regulations and remand for FERC to engage in the required consultation with the CEQ. And fourth, we dismiss without prejudice, because it is not ripe, the part of one petition for review that seeks to challenge the content of the amendments (which we are vacating) to FERC's NEPA-implementing regulations.

I.

The states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities. As a result, the nation's transmission grid is an interconnected patchwork of state-authorized facilities. In recent times increasing concerns have been expressed about the capacity and reliability of the grid. Congress has reacted to these concerns by adding a new section (§ 216) to the FPA when it passed the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

FPA § 216 authorizes the Secretary of Energy to designate areas with electric transmission constraints affecting consumers as national interest electric transmission corridors. 16 U.S.C. § 824p(a).[1] Section 216 gives FERC the authority in national interest corridors to issue permits for the construction or modification of transmission facilities in certain instances, including the one at issue here: when a state entity with authority to approve the siting of facilities has "withheld approval for more than 1 year after the filing of an application" for a permit. *Id.* §§ 824p(b), 824p(b)(1)(C)(i).

FPA § 216(c)(2) directed FERC to issue rules

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[1]When citations to the new section are required, we will refer to the U.S. Code instead of the FPA.

specifying the form of, and the information to be contained in, an application for construction or modification of electric transmission facilities in a national interest corridor. *Id.* § 824p(c)(2). On June 26, 2006, FERC issued a notice of proposed rulemaking, proposing regulations to fulfill this statutory requirement. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors, 71 Fed. Reg. 36,258 (June 16, 2006) (Notice of Proposed Rulemaking). The notice also included proposed amendments to FERC's regulations implementing its responsibilities under NEPA with respect to the siting of electric transmission facilities.

In response to FERC's proposed rulemaking, petitioner Communities Against Regional Interconnect (CARI) and others submitted comments requesting that the Commission confirm that § 216(b)(1)(C)(i)'s phrase "withhold approval for more than 1 year" does not include a state's outright denial of a permit application within the one-year deadline. CARI also commented that certain of the proposed amendments to the regulations implementing NEPA unduly restricted application requirements for the evaluation of the environmental impacts of a proposed project. According to CARI, the amendments, among other things, did not require an adequate assessment of land use and socioeconomic impacts or sufficient consideration of non-transmission alternatives. On November 16, 2006, FERC issued its final rule, which contained the Commission's substantive interpretation of § 216(b)(1)(C)(i)'s phrase "withheld approval for more than 1 year." Regulations for Filing Applications

for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440 (Dec. 1, 2006) (Final Rule). FERC interpreted the phrase to include a state's *denial* of a permit within the one-year statutory time frame. In dissenting in part, Commissioner Kelly concluded that the majority's interpretation was contrary to the plain language of the statute. *Id.* at 69,476 (Comm'r Kelly, dissenting). The final rule also contained the regulations governing permit applications under § 216(b) of the FPA and implementing NEPA with respect to § 216(b) applications.

In mid-December 2006 the four petitioners in this proceeding--Piedmont Environmental Council (Piedmont), the Public Service Commission of the State of New York (NYPSC), the Minnesota Public Utilities Commission (Minnesota PUC), and CARI--filed requests for rehearing on FERC's final rule. All argued to FERC that it had erred in holding that § 216(b)(1)(C)(i)'s phrase "withheld approval [of an application] for more than 1 year" includes a denial. Petitioner CARI raised additional challenges in its rehearing request, contending that FERC (1) violated NEPA by issuing the final rule without preparing an environmental assessment or an environmental impact statement; (2) erred in revising its NEPA-implementing regulations without first consulting with the CEQ; and (3) arbitrarily and capriciously issued regulations that unduly restrict application requirements for the evaluation of a proposed project's environmental impacts, particularly in the areas of land use, socioeconomics, and the assessment of non-

transmission alternatives. On May 17, 2007, FERC issued an order denying rehearing. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 119 FERC ¶ 61,154 (2007) (Order Denying Rehearing). The Commission rejected the petitioners' arguments about the meaning of § 216(b)(1)(C)(i), saying that it "continue[d] to believe that a reasonable interpretation of the language of the legislation support[ed]" its earlier conclusion. *Id.* at 61,979. Commissioner Kelly again dissented on this issue. *Id.* at 61,988. The Commission also rejected CARI's additional arguments. First, FERC said that consultation with CEQ about the amendments to the Commission's NEPA regulations was not necessary because it was simply developing regulations to implement the FPA, not NEPA. Second, FERC concluded that no environmental assessment or impact statement was required in connection with the issuance of the final rule because the new regulations are procedural in nature, that is, they deal with notice and filing requirements for permit applications. Moreover, FERC noted that the regulations themselves do not authorize any construction. Third, FERC addressed CARI's argument that the NEPA-implementing regulations arbitrarily and capriciously restrict application requirements for the evaluation of land use impacts, socioeconomic impacts, and non-transmission alternatives. The Commission said that its regulations in these areas set forth only the minimum initial information required for filing an application; the regulations do not limit the environmental analysis that might be required with respect to a particular project proposal.

Piedmont filed in this circuit a petition for review of FERC's final rule and its order denying rehearing. Thereafter, petitions for review of the final rule and order were filed by the NYPSC in the Second Circuit, by the Minnesota PUC in the D.C. Circuit, and by CARI in the D.C. Circuit. The petitions filed in the Second and D.C. Circuits were transferred to this circuit and thereafter consolidated with the Piedmont petition. All petitioners challenge FERC's interpretation of § 216(b)(1)(C)(i). In addition, CARI challenges (1) FERC's failure to prepare an environmental assessment or impact statement before issuing its final rule, (2) FERC's failure to consult the CEQ before revising its NEPA regulations, and (3) FERC's restriction, in the revised NEPA regulations, of the environmental impacts and project alternatives permit applicants are required to evaluate.

II.

Section 216(b)(1)(C)(i) of the FPA grants FERC the authority to issue permits for the construction or modification of electric transmission facilities in national interest corridors when a state commission has "withheld approval for more than 1 year after the filing of an application." 16 U.S.C. § 824p(b)(1)(C)(i). The petitioners challenge FERC's broad interpretation of this jurisdiction-granting provision.

A.

The petitioners argue that because the authority to site transmission facilities has traditionally been

left to the states, we must apply the presumption against preemption in construing § 216(b)(1)'s grant of siting jurisdiction to FERC. This presumption "start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985) (internal quotation marks omitted). The Supreme Court made clear, however, in *New York v. FERC*, 535 U.S. 1 (2002), that the presumption against preemption does not apply in a case like the one before us today. *New York* held that when Congress has conferred authority upon a federal agency to act in an area of preexisting state regulation, and there is simply a question about the scope of that authority, "we must interpret the statute to determine whether Congress has given [the agency] the power to act as it has, and we do so without any presumption one way or the other." 535 U.S. at 18.

We will therefore review FERC's construction of § 216(b) of the FPA without applying any presumption, and our review will be guided by *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron* we first determine whether Congress has "directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." 467 U.S. at 842. On the other hand, if we conclude that "the statute is silent or ambiguous with respect to the specific [question]," we then determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In determining "[t]he plainness or ambiguity of statutory

language," we refer "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

B.

FERC interprets § 216(b)(1)(C)(i)'s phrase "withheld approval for more than 1 year after the filing of [a permit] application" to include a state's outright denial of an application within one year. We conclude that FERC's interpretation is contrary to the plain meaning of the statute. Simply put, the statute does not give FERC permitting authority when a state has affirmatively denied a permit application within the one-year deadline.

We begin with the word "withhold," which means "to hold back : keep from action" or "to desist or refrain from granting, giving, or allowing." Webster's Third New Int'l Dictionary (Webster's) 2627 (2002). We must, of course, consider the word "withheld" in the context of the statutory phrase in which it is used – "withheld approval for more than 1 year." The phrase, read as a whole, means that action has been held back *continuously* over a period of time (more than one year). The continuous act of withholding approval for more than a year cannot include the finite act of denying an application within the one-year deadline. The denial of an application is a final act that stops the running of time during which approval was withheld on a pending application.

To support its interpretation that withholding approval includes the denial of a permit, FERC relies on the dictionary definition of "deny" and a thesaurus entry under "refusal." Specifically, FERC quotes the following definition of "deny": "to refuse to grant: WITHHOLD." Webster's at 603 (capitalization in original). The thesaurus paragraph for "refusal" that FERC relies upon lists "deny" and "withhold" as synonyms. Roget's International Thesaurus, ¶ 776.4 (4th ed. 1984). The word used in the statute is "withheld," so FERC takes a backward approach to its desired result when it relies on the meaning of a word it wishes to substitute for "withheld." The word "deny" is broad enough to include "withhold" in its definition, but the word "withhold" is not broad enough to include "deny" in its definition. *Compare* Webster's at 603 (definition of deny) *with* Webster's at 2627 (definition of withhold). FERC therefore gets no real support from the dictionary. Moreover, just because "deny" and "withhold" are listed as synonyms does not mean that they are always interchangeable. Certainly they are not interchangeable here.

When FERC substitutes "denied" for "withheld," it ignores the context in which "withheld" is used. With FERC's word substitution the statutory phrase would read "*denied* approval [of an application] for more than 1 year." The substitution renders the entire phrase nonsensical because, in the context of dealing with a permit application, the final nature of "denied" conflicts with the continuing nature of "*for* more than 1 year." FERC would thus change the clear meaning of the provision because the denial of a permit

application *within* one year ends the application process, and there is nothing about that terminated process that would continue *for* more than one year.

An examination of § 216(b)(1) as a whole, which is the broader context in which the "withheld approval for more than 1 year" phrase appears, confirms that the phrase does not encompass the denial of a permit. Section 216(b)(1) provides a carefully drawn list of five circumstances when FERC may preempt a state and issue a permit for the construction or modification of electric transmission facilities in a national interest corridor. They are when: (1) a state in which the transmission facilities are to be constructed or modified does not have the authority to approve the siting, 16 U.S.C. § 824p(b)(1)(A)(i); (2) a state does not have the authority to consider the expected interstate benefits to be achieved by the proposed project, *id.* § 824p(b)(1)(A)(ii); (3) a permit applicant is a transmitting utility under the FPA, but does not qualify for a permit in a particular state because it does not serve end-use customers in that state, *id.* § 824p(b)(1)(B); (4) (the circumstance at issue here) a state commission has withheld approval for more than one year after the filing of an application or the designation of the relevant national interest corridor, whichever is later, *id.* § 824p(b)(1)(C)(i); or (5) a state commission has conditioned its approval in such a manner that the proposed construction or modification is not economically feasible or will not significantly reduce transmission congestion in interstate commerce, *id.* § 824p(b)(1)(C)(ii).

If the circumstance of withholding permit approval is set aside, the remaining four circumstances allow FERC jurisdiction only when a state commission either is unable to act or acts inappropriately by including project-killing conditions in an approved permit. These are limited grants of jurisdiction to FERC, and they indicate that Congress meant for the "withheld [permit] approval" circumstance to be limited as well. FERC's reading of the "withheld approval" circumstance to include denial of a permit renders it completely out of proportion with the four other jurisdiction-granting circumstances in § 216(b)(1). The Commission's reading would mean that Congress has told state commissions that they will lose jurisdiction unless they approve every permit application in a national interest corridor. Under such a reading it would be futile for a state commission to deny a permit based on traditional considerations like cost and benefit, land use and environmental impacts, and health and safety. It would be futile, in other words, for a commission to do its normal work. When the five circumstances in § 216(b)(1) are considered together, they indicate that Congress intended only a measured, although important, transfer of jurisdiction to FERC. In providing for this measured transfer of jurisdiction, Congress simply makes sure that there is a utility commission available – if not a state commission, then FERC – to make a timely and straightforward decision on every permit application in a national interest corridor. In short, § 216(b)(1), read as a whole, does not indicate that Congress intended to bring about the sweeping transfer of jurisdiction suggested by FERC. Indeed, if Congress

had intended to take the monumental step of preempting state jurisdiction *every time* a state commission denies a permit in a national interest corridor, it would surely have said so directly.

FERC argues that its authority under § 216(b)(1)(C)(ii) to take jurisdiction when a state commission approves a permit but imposes project-sinking conditions supports its interpretation of "withheld approval" in § 216(b)(1)(C)(i) as a broad grant of jurisdiction. According to FERC, Congress would not "intentionally *allow* federal intervention in the event of onerous state approvals that scuttle projects in national corridors, and yet intentionally *bar* federal review where the state outright denies the application, achieving the same result." FERC Br. at 22 (emphasis in original). FERC's argument overlooks a crucial difference between the two situations. When a state commission grants approval with project-killing conditions, it misuses its authority, and the state licensing system has failed. On the other hand, when a state commission denies an application outright, it acts with transparency and engages in a legitimate use of its traditional powers. There is thus no logical inconsistency between authorizing FERC to assume jurisdiction in the case of permit approvals with overburdensome conditions but not in the case of outright denials.[2]

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[2]The dissent is mistaken when it says that § 216(i)'s interstate compact provision supports its interpretation of § 216(b)(1)(C)(i). Section 216(i) authorizes three or more contiguous states to enter into an interstate compact establishing a regional

We have analyzed the phrase "withheld approval for more than 1 year." Read by itself, the phrase does not include the outright denial of a permit application within the one-year deadline. We have also considered the phrase in the context of the entire statutory provision in which it appears. A reading of the entire provision reveals that Congress intended to act in a measured way and conferred authority on FERC only when a state commission is unable to act on a permit application in a national interest corridor,

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transmission siting agency. 16 U.S.C. § 824p(i). FERC has "no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement." *Id.* § 824p(i)(4). The dissent contends that if Congress had intended in § 216(b)(1)(C)(i) "to allow a single state to simply veto a transmission facility," there would have been no reason "to provide [in § 216(i)(4)] that states in [interstate] compacts must unanimously oppose the grant of an application to deprive FERC of authority." *Post* at 35. The dissent misreads Congress's intent. The two sections are in harmony, but not in the way the dissent suggests. An interstate compact agency does not lose jurisdiction to FERC when it denies a permit, just as a single state commission does not lose jurisdiction when it denies a permit on a timely basis. In addition, § 216(i) imposes greater limitations on FERC authority than those in § 216(b)(1)(C). FERC cannot step in if an interstate compact agency, acting in conformity with § 216(i), considers an application for more than a year or imposes permit conditions that make a project economically infeasible. *Cf.* 16 U.S.C. §§ 824p(b)(1)(C)(i), (ii). Both § 216(i) and § 216(b)(1) confirm that FERC may take jurisdiction only in limited circumstances. Nothing in § 216(i)'s interstate compact provision suggests that § 216(b)(1)(C)(i) should be read to mean that a state commission must grant a permit application in a national interest corridor or else lose jurisdiction to FERC.

fails to act in a timely manner, or acts inappropriately by granting a permit with project-killing conditions. The broader context of § 216(b) thus confirms that the meaning of "withheld approval for more than 1 year" is plain: it means that action on a permit application has been held back continuously for more than one year. The continuous act of withholding approval does not include the final administrative act of denying a permit. Because Congress's intent is clear, our review under *Chevron* proceeds no further. For these reasons, we reverse FERC's interpretation of the phrase "withheld approval for more than 1 year."

III.

Petitioner CARI claims that FERC was required to prepare an environmental assessment (EA) or an environmental impact statement (EIS) when it adopted its regulations detailing the information requirements for permit applications under § 216 of the FPA. NEPA requires federal agencies to prepare an EA or an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). FERC determined that its adoption of the new regulations did not amount to major federal action because the regulations were simply procedural. Thus, according to FERC, neither an EA nor an EIS was required. FERC's determination is reviewed for reasonableness under the circumstances. *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 512 (4th Cir. 1992).

CEQ regulations implementing NEPA define

"major federal action" to include "actions with effects that may be major and which are potentially subject to federal control and responsibility." 40 C.F.R. § 1508.18. According to the regulations, "[f]ederal actions tend to fall within one of the following categories": (1) adoption of official policy (rules, regulations, and interpretations), (2) adoption of formal plans, (3) adoption of programs, and (4) approval of specific projects. *Id.* §1508.18(b). FERC relied on one of its own NEPA-implementing regulations in determining that neither an EA nor an EIS was required in connection with the issuance of the permit application rules. The regulation provides that neither of these statements will be prepared in connection with the "promulgation of rules that are . . . procedural." 18 C.F.R. § 380.4(a)(2)(ii). FERC, of course, emphasizes that it will, at the appropriate time, undertake a full environmental analysis for every proposed transmission project. CARI argues that project-specific environmental assessments will not be enough. Rather, CARI says, a programmatic EIS is required at this stage.

As the D.C. Circuit has explained, "a programmatic EIS reflects the broad environmental consequences attendant upon a wide-ranging [and systematic] federal program." *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 888 (D.C. Cir. 1981). The D.C. Circuit suggests two questions that are "helpful in reviewing [a federal agency's] decision not to prepare a programmatic EIS." *Id.* at 889. The questions are: "[1] Could the programmatic EIS be sufficiently forward looking to contribute to the

[agency's] basic planning of the overall program? and, [2] Does the [agency] purport to 'segment' the overall program, thereby unreasonably constricting the scope of . . . environmental evaluation?" *Id.* at 889. CEQ regulations provide that a programmatic EIS should be prepared when federal actions are connected or cumulative, 40 C.F.R. § 1508.25(a)(1)-(2), or when actions are similar, and a single statement is the best vehicle for assessing environmental effects, *id.* § 1508.25(a)(3).

With respect to the D.C. Circuit's first question, we conclude that a programmatic EIS could not be sufficiently forward looking to contribute to FERC's basic planning for the overall program, that is, the Commission's permitting program for transmission facilities in national interest corridors. Because permit applications will come from private parties, FERC cannot now identify projects that are likely to be sited and permitted. By the same token, FERC does not have information about the ultimate geographic footprint of the permitting program. Without such information a programmatic EIS would not present a credible forward look and would therefore not be a useful tool for basic program planning. With respect to the D.C. Circuit's second question, we conclude that FERC's rules, which require individual project applications, are not designed to segment the overall program in order to constrict environmental evaluation. Separate and detailed permit applications for each project should facilitate, not impede, adequate environmental assessment. Moreover, FERC could group individual projects under a single EIS as

appropriate.

We turn next to the CEQ regulations that call for a programmatic EIS when federal actions are connected, cumulative, or similar. *See* 40 C.F.R. § 1508.25. First, actions are connected if they "[a]utomatically trigger other actions which may require environmental impact statements." *Id.* § 1508.25(a)(1)(i). FERC's actions in issuing its procedural regulations for permit applications do not automatically trigger any further action by the Commission. Of course, private parties will no doubt file permit applications that conform to the regulations, and FERC may issue permits that require it to prepare EISs. But FERC's issuance of a permit requiring an EIS is not an action that would be triggered automatically by its earlier action of issuing procedural regulations. Actions are also connected if they (1) "[c]annot or will not proceed unless other actions are taken previously or simultaneously" or (2) "are interdependent parts of a larger action and depend on the larger action for their justification." *Id.* § 1508.25(a)(1)(ii)-(iii). FERC's action in issuing the regulations is an independent action which stands alone and did not depend on any prior or simultaneous action by the Commission. Moreover, the action in issuing the regulations does not share mutual dependence with any larger FERC action that requires an EIS.

Second, cumulative actions are those "which when viewed with other proposed actions have cumulatively significant impacts and should therefore

be discussed in the same impact statement." *Id.* § 1508.25(a)(2). The regulations themselves did not authorize a project of any kind and do not authorize any alteration of the natural physical environment. Moreover, FERC has not proposed to issue any specific permit for construction. There are thus no cumulative actions with significant environmental effects.

Third, similar actions are those, "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together." *Id.* § 1508.25(a)(3). FERC's action in issuing regulations specifying the content of permit applications is not similar to the action of issuing a permit. The former action adopts application procedures while the latter involves the substantive review of the merits and consequences of a specific project proposal.

In sum, the standards and regulations that govern when a programmatic EIS should be issued do not indicate that one was required in this instance.

CARI's further argument that FERC must be required to do an EIS now, lest the Commission shirk its responsibilities later when project-specific EISs are required, is also without merit. Once FERC receives a permit application, it will be required under NEPA to assess the environmental effects of the project. The assessment will likely prompt the preparation of an EIS or an EA. Any deficiencies in project-specific environmental assessments may be challenged at the

appropriate time.

As of today, FERC has only promulgated regulations specifying the content of permit applications under § 216(b). This action, as the Commission reasonably determined, is not a major federal action significantly affecting the quality of the human environment. FERC therefore was not required to prepare an EA or an EIS in connection with its issuance of the regulations.[3]

IV.

Petitioner CARI further contends that FERC violated CEQ regulations when it revised its own NEPA-implementing regulations without first consulting with the CEQ. This claim raises a question of law that we review *de novo*. *North Carolina v. Fed. Aviation Admin.*, 957 F.2d 1125, 1128 (4th Cir. 1992).

The CEQ has promulgated regulations to implement the requirements of NEPA. *See* 40 C.F.R. § 1500 et seq. These implementing regulations require that "each [federal] agency shall as necessary adopt procedures to supplement [the CEQ's] regulations." *Id.* § 1507.3(a). "Each agency shall consult with the Council [CEQ] while developing its procedures and before publishing them in the Federal Register." *Id.* In

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[3]Because we have rejected FERC's interpretation of the phrase "withheld approval for more than 1 year," we do not reach CARI's argument that the interpretation itself was a major federal action that required an EIS.

addition, "[a]gencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of [NEPA]." *Id.* CEQ regulations are binding on federal agencies. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); Sugarloaf Citizens Ass'n, 959 F.2d at 512 n.3.

FERC's NEPA-implementing regulations, promulgated to supplement those of the CEQ, are found at 18 C.F.R. part 380. When FERC issued its final rule with regulations for filing applications for permits under § 216 of the FPA, the Commission included a number of substantial amendments to its NEPA-implementing regulations. *See* Final Rule, 71 Fed. Reg. at 69,470-75. These amendments include revisions or additions to 18 C.F.R. § 380.3 (adding electric transmission projects to the list of actions for which applicants must submit environmental information); § 380.5 (listing projects that require an environmental assessment); § 380.6 (listing projects, including those involving major electric transmission facilities, that require an environmental impact statement), § 380.8 (making the preparation of environmental documents for electric transmission facilities in national interest corridors the responsibility of FERC's Office of Energy Projects); § 380.10 (allowing motions to intervene by third parties once an application has been filed); and § 380.15 (detailing siting and maintenance requirements). The final rule also adds a new section to FERC's NEPA regulations, § 380.16, which sets forth the various categories of information that must be included in the

environmental report submitted with an application.

FERC argues that the regulations listed above were issued to implement § 216 of the FPA, not NEPA. This argument has no support whatsoever; indeed, it is contrary to statements made by FERC during the rulemaking process. In its notice of proposed rulemaking, FERC said: "Part 380 [18 C.F.R.] of the Commission's regulations implements its responsibilities under NEPA. The Commission proposes to revise those regulations by adding sections dealing with its new responsibilities with respect to the siting of electric transmission facilities." Notice of Proposed Rulemaking, 71 Fed. Reg. at 36,265. This statement by FERC and especially the content of the amendments to 18 C.F.R. part 380 leave no doubt that FERC was also implementing NEPA, not just § 216 of the FPA, when it amended its NEPA regulations in the final rule.

FERC argues in the alternative that § 1507.3(a) of the CEQ regulations only require an agency to consult with the CEQ when the agency develops its initial NEPA-implementing regulations. This argument also fails. Under § 1507.3(a) an agency has a continuing duty to review its procedures (or regulations) "*and in consultation with the [CEQ] to revise them as necessary* to ensure full compliance with the purposes and provisions of [NEPA]." 40 C.F.R. § 1507.3(a). FERC violated § 1507.3(a) when it failed to consult with the CEQ before revising its NEPA regulations in the final rule. We therefore vacate the amendments to FERC's NEPA regulations,

18 C.F.R. part 380, that are set forth in the final rule. Once FERC consults with the CEQ, FERC may, if it determines that no modifications are warranted, enter an order reinstating the amendments. If, however, the Commission proposes to make modifications after the consultation, it may pursue appropriate rulemaking procedures.

V.

Finally, CARI argues that FERC's amended NEPA regulations arbitrarily and capriciously restrict the environmental impact information that must be submitted in an application for construction of transmission facilities under § 216(b). CARI attacks the amended regulations in four areas.

First, CARI contends that the new provision at 18 C.F.R. § 380.16(j) unduly restricts the evaluation of impacts on land use, recreation, and aesthetics to those within one-quarter mile of the proposed transmission line right-of-way. According to CARI, a fair definition of an overhead transmission line's area of impact should begin with a minimum range of one-half mile and be extended, if appropriate, in specific cases.

Second, CARI contends that new § 380.16(k) of the NEPA regulations unduly restricts the range of non-transmission alternatives that an applicant must consider. The regulation requires "[d]iscuss[ion of] the 'no action' alternative and other alternatives given serious consideration" by the applicant. 18 C.F.R. §

380.16(k)(1). CARI argues that all reasonable alternatives must be examined.

Third, CARI contends that FERC inappropriately eliminated a proposed § 380.16(g)(7), set forth in its notice of proposed rulemaking, that would have required the applicant to undertake a property value analysis for residential properties located adjacent to or abutting the proposed right-of-way. *See* Notice of Proposed Rulemaking, 71 Fed. Reg. at 36,273. This deletion, CARI says, violates CEQ regulations, which require an evaluation of economic or social effects when they are interrelated with the project's effects on the natural or physical environment. *See* 40 C.F.R. § 1508.14.

Fourth, CARI contends that FERC fails to require applicants to evaluate a proposed project's effect on the cost of electricity to the consumer, in violation of 40 C.F.R. § 1508.14, which requires the evaluation of a project's economic effects to the extent they are interrelated with natural or physical effects. According to CARI, the consideration of a project's effect on consumer electricity prices should not be deferred entirely for post-project ratemaking procedures; rather, this important effect should be considered before a project is built.

In part IV, *supra*, we decided to vacate FERC's amendments to its NEPA regulations, which are included in the final rule. Our decision will allow FERC to engage in the required consultation with the CEQ. Until that consultation takes place, and any

necessary proceedings before the Commission occur, we will not know the exact content of FERC's amendments to it NEPA regulations. As a result, CARI's specific challenges relating to those amendments are not ripe for consideration and resolution at this time. We will therefore dismiss CARI's petition for review without prejudice insofar as it challenges the content of FERC's amendments to its NEPA regulations.

VI.

In conclusion, the petitions for review in cases No. 07-1651 (filed by Piedmont), No. 07-1864 (filed by the NYPSC), and No. 07-1865 (filed by the Minnesota PUC) are granted. These petitions challenge FERC's interpretation of the phrase "withheld approval for more than 1 year" in § 216(b)(1)(C)(i) of the FPA. The petition in case No. 07-1866 (filed by CARI) is also granted to the extent it raises this same issue. Here, we reverse FERC's interpretation. The phrase "withheld approval for more than 1 year" – under its plain meaning – does not give FERC jurisdiction under § 216(b)(1) when a state commission denies a permit application for the construction or modification of electric transmission facilities in a national interest corridor.

The petition for review in No. 07-1866 (filed by CARI) is granted insofar as it challenges FERC's decision not to prepare an environmental assessment or an environmental impact statement before issuing its final rule that includes regulations for filing permit

applications under § 216(b). On this issue we affirm FERC's decision not to prepare an EA or an EIS.

The petition for review in No. 07-1866 (filed by CARI) is granted insofar as it challenges FERC's failure to consult with the CEQ before issuing amendments to its (FERC's) regulations implementing NEPA. With respect to this challenge, we hold that consultation was required, and, we therefore vacate the amendments to FERC's NEPA regulations. Consultation may be pursued on remand.

The petition for review in No. 07-1866 (filed by CARI) is dismissed without prejudice insofar as it raises specific challenges to the content of amendments to FERC's NEPA regulations. These challenges are not ripe for consideration.

The cases are remanded to FERC.

REVERSED IN PART, AFFIRMED IN PART, VACATED IN PART, DISMISSED IN PART WITHOUT PREJUDICE, AND REMANDED

TRAXLER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts III, IV, and V of the majority opinion (with the exception of footnote 3). However, because I believe that FERC correctly interpreted "withheld approval [of a permit application] for more than 1 year" in 16 U.S.C.A. § 824p(b)(1)(C) (West Supp. 2008) to include the failure or refusal to grant a

permit application for more than one year in cases in which the permit application was denied, I respectfully dissent from the contrary holding.

I.

A.

Before examining the specific statutory language in question, I pause briefly to discuss the circumstances that brought about the legislation. Most important among these circumstances is the shift, since the enactment of the Federal Power Act, in the way that electricity has been produced and delivered to consumers, from it being generated and consumed in the same general geographic area to it being transmitted great distances from the area in which it was generated.

> [U]nlike the local power networks of the past, electricity is now delivered over three major networks, or "grids," in the continental United States . . . . It is only in Hawaii and Alaska and on the "Texas Interconnect" – which covers most of that State – that electricity is distributed entirely within a single state. In the rest of the country, any electricity that enters the grid immediately becomes part of a vast pool of energy that is constantly moving in interstate commerce. As a result, it is now possible for power companies to transmit electric

energy over long distances at a low cost.

New York v. FERC, 535 U.S. 1, 7-8 (2002) (footnote omitted). A study issued in May 2002 by the Department of Energy noted, however, that construction of new transmission facilities has been unable to keep up with increasing demands for electricity, resulting in transmission bottlenecks that have increased consumer costs as well as the chances of blackouts. *See* U.S. Dep't of Energy, National Transmission Grid Study (May 2002) ("Study"), at xi, 5-6 *available at* http://www.ferc.gov/industries/electric/gen-info/transmission-grid.pdf. The Study further determined and recommended:

> Rules and regulations that will improve procedures for the siting and permitting of transmission lines should be implemented immediately. The FERC should play a limited role focused on supporting state and regional efforts, but should also possess backstop authority to ensure that transmission facilities that eliminate national interest transmission bottlenecks are sited and constructed. The FERC should act if state and regional bodies are unsuccessful in siting and permitting national interest transmission lines.

Study at 58-59. In this regard, Senate Energy and Natural Resource Committee Chairman Domenici stated on the Senate floor concerning pending

legislation that eventually would become the Energy Policy Act of 2005 ("EPAct 2005"), Pub. L. No. 109-58, 119 Stat. 594 (2005):

> To avoid future blackouts and provide our industry and consumers with the reliable electricity they need, we need to invest in critical transmission infrastructure; provide limited Federal siting authority of transmission lines to ensure the transmission of national interest lines, and avoid the most significant areas where we had gridlock; [and] streamline the permitting of siting for transmission lines to assure adequate transmission. . . . We need all these parts of the Energy bill.

150 Cong. Rec. S3732 (daily ed. April 5, 2004) (statement of Sen. Domenici). It was in this context that Congress enacted EPAct 2005.

B.

I agree for the reason explained by my colleagues that our review of the statutory language at issue must be guided by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See ante* at 13-14. Under *Chevron*, we must first determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, we need go no further. *See id.* On the other hand, "if the statute is silent or ambiguous with

respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. We would not need to conclude that the agency's interpretation is "the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. Rather, to uphold the agency's construction, we need only find that it was "reasonable." *Id.* at 844. In my view, the language of the statute, when considered in the context of the statute's purpose and other provisions in the statute, is susceptible to only one interpretation, the one that FERC adopted.

Section 824p(b) allows FERC, after notice and an opportunity for hearing, to issue permits for construction or modification of electric transmission facilities in areas the Secretary of Energy has designated as national interest electric transmission corridors if it finds that

> (1)(A) a State in which the transmission facilities are to be constructed or modified does not have authority to--
>
> (i) approve the siting of the facilities; or
>
> (ii) consider the interstate benefits expected to be achieved by the

proposed construction or modification of transmission facilities in the State;

(B) the applicant for a permit is a transmitting utility under this chapter but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or

(C) a State commission or other entity that has authority to approve the siting of the facilities has--

(i) *withheld approval for more than 1 year* after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or

(ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce

> transmission congestion in interstate commerce or is not economically feasible;
>
> (2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;
>
> (3) the proposed construction or modification is consistent with the public interest;
>
> (4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;
>
> (5) the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and (6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.

16 U.S.C.A. § 824p(b) (emphasis added).

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is

used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). We begin with the statutory text. *See Tidewater Fin. Co. v. Williams,* 498 F.3d 249, 254 (4th Cir. 2007). "In the absence of a definition from Congress in a statute, or a clear congressional intent to the contrary, we accord words in a statute their ordinary, contemporary, common meaning." *Worden v. SunTrust Banks, Inc.*, 549 F.3d 334, 345 (4th Cir. 2008) (citation & internal quotation marks omitted). Applying the common meaning of the word "withhold" yields a straightforward rule that a state has "withheld approval for more than 1 year" when one year after approval has been sought, the state still has not granted it, regardless of the reason. *See Funk & Wagnalls Standard Dictionary* 936 (1980) (defining "withhold" in part as "[t]o keep back; decline to grant"). Indeed, this is the construction that FERC adopted.

Despite the apparent clarity of the words "withhold" and "approval," Petitioners maintain that even if a state has not granted approval more than a year after an application has been submitted, it has not "withheld approval for more than 1 year" if it has affirmatively denied the application. Petitioners argue that denying approval cannot constitute "withh[olding] approval" because a denial is a discrete event and it therefore makes no sense to speak of "denying approval for more than 1 year."

In my opinion, this argument is not sound. Under FERC's interpretation, the discrete event of denial does not *constitute* the withholding of approval

that extends for more than one year after the application is received. The denial is merely one event that may occur during the more-than-one-year period in which approval is withheld. Under the common meaning of the words "withhold" and "approval," approval is withheld, *i.e.*, not granted, every day that no decision is issued granting approval, and it continues to be withheld on the day an application is denied (as well as every day that such a denial is not reconsidered). Thus, if a state denies an application, and then, ten months after submission of the application, reverses course and grants the application, it would certainly be the case that the state "withheld approval" for ten months before granting it. Similarly, if one year and one day after submission of an application a state has denied an application (and not reconsidered its decision), it has "withheld approval for more than 1 year." There is no other reasonable way to interpret those words.[1]

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[1]Petitioners contend that had Congress intended that a state could have "withheld approval for more than 1 year" in a case in which the application was denied during the one-year period, it could have conveyed that notion more clearly had it substituted "denied an application or failed to act for more than one year," for "withheld approval." Petitioners note that Congress actually employed such language in another part of the statute, *see* 16 U.S.C.A. § 824p(h)(6)(A) (West Supp. 2008) ("If any agency has denied a Federal authorization required for a transmission facility, or has failed to act by the deadline established . . ."), and Petitioners suggest that its decision not to do so here creates some doubt as to what Congress intended. Petitioners' point might have some force if the language Congress did choose were reasonably susceptible to more than one meaning, but it is not, as I have explained. Moreover, had Congress simply meant "failed to act on

Not surprisingly, an examination of the context in which these words are used and the context of the statute as a whole confirms that Congress meant its words to be given their common meaning. First and foremost is the subsection directly following 16 U.S.C.A. § 824p(b)(1)(C)(i), which gives FERC authority when a state has granted approval but "conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible." 16 U.S.C.A. § 824p(b)(1)(C)(ii). Read together, the two subsections provide that while a state has a full year to consider and act on an application without interference from FERC, FERC nevertheless has the authority to ensure that a state does not frustrate the goal of significantly reducing transmission congestion in a national interest corridor. Petitioners, however, suggest that Congress did not intend to essentially "trump" the states' permitting decisions in order to accomplish this goal. That suggestion is completely belied, however, by *Congress's undisputed willingness to do just that when a state grants a permit under conditions FERC determines to be unreasonable. See* 16 U.S.C.A. § 824p(b)(1)(C)(ii). The notion that

---

an application for more than 1 year," and not meant the statute to include outright denials, it could easily have used words that actually had that meaning, as it did in another part of EPAct 2005. *See* 16 U.S.C.A. § 824b(a)(5) (West Supp. 2008) ("If the Commission does not act within 180 days [on an application] . . .").

Congress would have been willing to "trump" states when they thwart the goal of significantly reducing transmission congestion in a national interest corridor by granting permits subject to conditions FERC determines to be unreasonable but would not be willing to do so when states thwart the same goal by denying the permits outright makes no sense to me in light of the purpose of the legislation.

The argument that Petitioners' interpretation can be squared with § 824p(b)(1)(C)(ii) because "[w]hen a state commission grants approval with project-killing conditions, it misuses its authority, and the state licensing system has failed," but when a state simply denies an application, it "acts with transparency and engages in a legitimate use of its traditional powers," *ante* at 17, is not correct in my view. With all due respect, such a misuse of authority would occur only if a state granted its approval with conditions that it imposed *for the purpose of* killing the project. Section 824p(b)(1)(C)(ii) is not so narrow as to limit FERC's jurisdiction to cases in which such intentionally deceptive action has occurred. Rather, it clearly allows FERC to exercise jurisdiction based on simple differences of opinion between FERC and the state regarding the impact of the conditions imposed.[2]

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[2]For the same reason, in my view, the conclusion that the four circumstances other than § 824p(b)(1)(C)(i) "allow FERC jurisdiction only when a state commission either is unable to act or acts *inappropriately*," *ante* at 16 (emphasis added), is not correct with respect to § 824p(b)(1)(C)(ii) if "inappropriately" refers to a misuse of authority.

Nor can I square 16 U.S.C.A. § 824p(i) (West Supp. 2008) with Petitioners' suggestion that Congress intended to allow a single state to impede Congress's goal of reducing transmission congestion in national interest electric transmission corridors by simply denying an application outright. That subsection allows three or more contiguous states to enter into an interstate compact, subject to Congress's approval. States that have entered into such compacts are authorized to establish regional transmission siting agencies that can facilitate siting of electric transmission facilities within those states and carry out their siting responsibilities. FERC has no authority to issue permits for construction or modification of electric transmission facilities within such states so long as all states in the compact agree that the permit should not be issued. *See* 16 U.S.C.A. § 824p(i)(4). Had Congress been inclined to allow a single state to simply veto a transmission facility for purely local reasons – as it could do under Petitioners' construction – there would have been no reason to provide for these interstate compacts or to provide that states in such compacts must unanimously oppose the grant of an application to deprive FERC of authority.

I recognize that several states participating in this appeal as amici curiae contend that FERC's interpretation would render the states' consideration of applications irrelevant. Even if the contention were true, it would not create an ambiguity in the statute, especially considering the critical national energy interests that Congress sought to protect with this legislation. FERC brings a broader national

perspective to siting proposals in national interest electric transmission corridors than individual states possess, and Congress clearly intended that FERC would be authorized to act from that perspective. Nevertheless, the contention that FERC's interpretation makes the states' permitting decisions irrelevant is not correct. FERC has explained that it takes into consideration a state's decision in making its own permitting determinations. Furthermore, a state has the authority to impose on any grant of an application conditions that FERC is powerless to overturn so long as the conditions are economically feasible and would not prevent the significant reduction of transmission congestion in interstate commerce. *See* 16 U.S.C.A. § 824p(b)(1)(C)(ii). By considering the states' decisions and allowing states to impose reasonable conditions upon application grants, FERC can pursue important national energy interests while at the same time respecting, to some degree, the interests and judgments of the states. Thus, FERC's interpretation is strongly supported by the framework of the statutory scheme as a whole.

C.

Although it is not determinative, it is nonetheless worth noting that FERC's construction, which I believe to be the only plausible reading of the statute, is also buttressed by the applicable legislative history. The plainest statements from the House of Representatives are from the House Committee Report on bill H.R. 1640, which contained language identical to the bill the President eventually signed, H.R. 6. The

House Report described the bill as allowing FERC authority "if, after one year, a state, or other approval authority is unable or refuses to site the line." H.R. Rep. No. 109-215(I), at 261 (2005). Indeed, the House Report also contains "Dissenting Views" of members who understood the bill to have the very same meaning. *See id.* at 494 (noting that bill would "preempt . . . state decisions about whether new or expanded lines should be built"). At least two congressmen, in discussing the merits of the siting provisions of the bill, recognized the clear import of the language. Representative Dingel stated that it "eliminates . . . deference to the States in decisions about the siting of electric transmission lines and natural gas facilities," 151 Cong. Rec. H2193 (daily ed. Apr. 20, 2005), and Representative Shays noted that the bill allows FERC "to preempt state siting authorities when it is determined that a high-voltage power line is of 'national significance,'" *id.* at H2196. Similarly, a Senate committee report summarizing a bill, S. 10, that contained relevant language identical to that of § 824p(b)(1)(C)(i), described the bill as "authoriz[ing] FERC to issue siting permits if a State withholds approval *inappropriately*." S. Rep. No. 109-78, at 5 (2005) (emphasis added). The use of the term "inappropriately" strongly suggests that the Committee primarily had in mind situations in which a state denied a permit that was necessary to ensure reliability of the national transmission grid, not simply situations where a state had not ruled on an application for a certain period of time.

Petitioners maintain that FERC's authority in

the legislative history is often described as "limited" or "backstop," which they believe indicates that FERC lacks authority when a state denies a permit outright. But that is simply not the case. This characterization merely recognizes what I have already explained – that Congress sought to achieve a balance in giving the states an opportunity to dispose of permit applications without involvement by FERC, by allowing the states to place reasonable conditions on the grant of such permits that could not be overruled, and by allowing them to form compacts of three or more contiguous states whose unanimous denials also could not be overridden. That FERC's authority may be limited does not even suggest that Congress would not have authority to grant applications in some situations in which states had denied them. *See* Study, at 59 ("The FERC should play a limited role focused on supporting state and regional efforts, but should also possess *backstop authority to ensure that transmission facilities that eliminate national interest transmission bottlenecks are sited and constructed.* The FERC should act if state and regional bodies are unsuccessful in siting and permitting national interest transmission lines.") (emphasis added).

II.

In sum, the reasons are numerous for concluding that § 824p(b)(1)(C)(i) plainly has the meaning that FERC adopted. Only FERC's interpretation gives Congress's words their common meaning, and only FERC's interpretation makes sense in the context in which the language is used and in the

context of the statute as a whole. Indeed, as I have explained, that plain meaning is also the one indicated in the applicable legislative history. Finally, even assuming *arguendo* that the statute's meaning were not plain, I would conclude that FERC's interpretation was reasonable at the very least, and therefore entitled to deference under *Chevron*. I would therefore affirm FERC's interpretation.[3]

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[3]Because I would affirm FERC's construction, I would need to address the claim of Petitioner Communities Against Regional Interconnect that FERC was required to prepare an environmental assessment ("EA") or an environmental impact statement ("EIS") when it adopted its interpretation. I would hold that FERC's decision not to prepare an EA or an EIS was reasonable. See Sugarloaf Citizens Ass'n v. FERC, 959 F.2d 508, 512 (4th Cir. 1992) (stating standard of review).

APPENDIX B

FILED: April 20, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1651 (L)
(RM06-12-001)
(RM06-12-000)

PIEDMONT ENVIRONMENTAL COUNCIL;
Petitioner

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (NYPSC);
MINNESOTA PUBLIC UTILITIES COMMISSION
Intervenors

v.

FEDERAL ENERGY REGULATORY COMMISSION;
Respondent

SOUTHERN CALIFORNIA EDISON COMPANY;
ALLEGHENY POWER;
TRANS-ALLEGHENY INTERSTATE LINE COMPANY;
EDISON ELECTRIC INSTITUTE;
AMERICAN PUBLIC POWER ASSOCIATION;

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION;
AMERICAN WIND ENERGY ASSOCIATION;
SAN DIEGO GAS & ELECTRIC COMPANY;
PPL ELECTRIC UTILITIES CORPORATION
Intervenors

STATE OF NEW YORK; STATE OF ARIZONA; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF IOWA; STATE OF KENTUCKY; STATE OF NEW HAMPSHIRE; STATE OF OHIO; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF WEST VIRGINIA; STATE OF WYOMING,
Amici Supporting Petitioner

ORDER

The petitions for rehearing en banc were circulated to the full Court. No judge requested a poll under Fed. R. App. P. 35. The Court denies the petitions for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities

Docket No. RM06-12-000

ORDER NO. 689

FINAL RULE

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities

Docket No. ,RM06-12-000
ORDER NO. 689

FINAL RULE

(Issued November 16, 2006)

1. On June 16, 2006, the Federal Energy Regulatory Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) in this proceeding.[1] In the NOPR, the Commission proposed regulations in accordance with section 1221 of the Energy Policy Act

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[1] 71 FR 36258 (June 26, 2006); FERC Stats. & Regs. ¶ 32,605 (2006).

of 2005 (EPAct 2005)[2] to implement filing requirements and procedures for entities seeking permits to construct or modify electric transmission facilities under the circumstances set forth in that section. This Final Rule considers comments submitted in response to the NOPR, and as a result, makes various modifications to the regulatory text described in the NOPR. Following the issuance of this rule, we will convene regional conferences to assist stakeholders in its implementation.

I. Background

2. On August 8, 2005, EPAct 2005 became law. Section 1221 of EPAct 2005 adds a new section 216 to the Federal Power Act (FPA), providing for Federal siting of electric transmission facilities under certain circumstances.

3. New FPA section 216 requires that the Secretary of the Department of Energy (DOE or Secretary) identify transmission constraints. It mandates that the Secretary conduct a study of electric transmission congestion within one year of enactment and every three years thereafter, and that the Secretary then issue a report. The Secretary is further empowered to designate certain constrained areas as national interest electric transmission corridors (National Corridors).

4. FPA section 216(b) provides that the

[2]Pub. L. No. 109-58, 119 Stat. 594 (2005).

Commission may issue permits to construct or modify electric transmission facilities in a National Corridor under certain circumstances. The Commission has the authority to issue permits to construct or modify electric transmission facilities if it finds that: (1) a State in which such facilities are located does not have the authority to approve the siting of the facilities or to consider the interstate benefits expected to be achieved by the construction or modification of the facilities; (2) the applicant is a transmitting utility but does not qualify to apply for siting approval in the State because the applicant does not serve end-use customers in the State; or (3) the State commission or entity with siting authority withholds approval of the facilities for more than one year after an application is filed or one year after the designation of the relevant national interest electric transmission corridor, whichever is later, or the State conditions the construction or modification of the facilities in such a manner that the proposal will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.[3]

5. Additionally, under FPA sections 216 (b)(2) through (6), before issuing a permit the Commission must find that the proposed facility: (1) will be used

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[3]Under FPA section 216(i)(4), the Commission may not issue a permit for facilities within a State that is a party to an interstate compact establishing a regional transmission siting agency unless the members of the compact are in disagreement and the Secretary of the Department of Energy makes certain findings.

for the transmission of electric energy in interstate commerce; (2) is consistent with the public interest; (3) will significantly reduce transmission congestion in interstate commerce and protect or benefit consumers; (4) is consistent with sound national energy policy and will enhance energy independence; and (5) will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.

6. New FPA section 216(h)(2) designates DOE as lead agency to coordinate all Federal authorizations needed to construct proposed electric transmission facilities in National Corridors. Under FPA section 216(h)(4)(A), to ensure timely efficient reviews and permit decisions, DOE is required to establish prompt and binding intermediate milestones and ultimate deadlines for all Federal reviews and authorizations required for a proposed electric transmission facility.[4] Section 216(h)(5)(A) of the FPA requires that DOE as lead agency, in consultation with the other affected agencies, prepare a single environmental review document that would be used as the basis for all decisions for the proposed projects under Federal law.

7. On May 16, 2006, the Secretary delegated paragraphs (2), (3), (4)(A)–(B), and (5) of FPA section

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[4]Under FPA section 216(h)(6)(A), if any agency has denied a Federal authorization required for a transmission facility, or has failed to act by the deadline established by the Secretary, the applicant or any State in which the facility would be located may file an appeal with the President.

216(h) to the Commission as they apply to proposed facilities in designated National Corridors for which an application for authority to construct has been submitted to the Commission.[5] Specifically, the Secretary delegated to the Commission DOE's lead agency responsibilities for the purpose of coordinating all applicable Federal authorizations and related environmental review and preparing a single environmental review document for facilities falling within the Commission's siting jurisdiction. With respect to such projects, the Commission will establish prompt and binding intermediate milestones and ultimate deadlines for the review, and ensure that all Federal permits are issued, and reviews are completed, within a year or as soon as practicable thereafter.

8. On August 8, 2006, DOE issued its National Electric Transmission Congestion Study that examined transmission congestion and constraints and identified affected transmission paths in many areas of the nation.[6] DOE states that it expects the study to open a dialogue with stakeholders in areas of the Nation where congestion is a matter of concern, focusing on ways in which these problems might be alleviated. DOE states that where appropriate in relation to the congestion areas, it may designate

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[5]Department of Energy Delegation Order No. 00-004.00A.

[6]Department of Energy, National Electric Transmission Congestion Study, Executive Summary (2006), http://www.oe.energy.gov/energy_policy/epa_sec1221.htm#Time line (follow "Congestion Study Executive Summary" hyperlink).

National Corridors.

9. Also on August 8, 2006, several Federal agencies including DOE and the Commission entered into a Memorandum of Understanding on Early Coordination of Federal Authorization and Related Environmental Reviews Required in Order to Site Electric Transmission Facilities (MOU).[7] The purpose of the MOU is to establish a framework for early cooperation and participation that will enhance coordination of all applicable land use authorizations, related environmental, cultural, and historic preservation reviews, and any other approvals that may be required under Federal law in order to site an electric transmission facility.

10. FPA section 216(c)(2) requires that the Commission issue rules specifying the form of, and the information to be contained in, an application for proposed construction or modification of electric transmission facilities in National Corridors, and the manner of service of notice of the permit application on interested persons. The Commission is implementing those regulations in a new Part 50 of existing subchapter B of its regulations.

II. Discussion

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[7]The other agencies include the Department of Defense, the Department of Agriculture, the Department of the Interior, the Department of Commerce, the Environmental Protection Agency, the Council on Environmental Quality, and the Advisory Council on Historic Preservation.

A. National Interest Transmission Corridors

11. As stated, on August 8, 2006, DOE issued its National Electric Transmission Congestion Study and stated that where appropriate in relation to the congestion areas, it may designate National Corridors. Once DOE designates a National Corridor, the Commission has the authority under FPA section 216(b) to issue permits to construct or modify electric transmission facilities in such a corridor under certain circumstances.

12. The Western Interstate Energy Board and Committee on Regional Electric Power Cooperation (Western Energy Board) and Western Governor's Association (Western Governors) request that the Commission delay issuing the Final Rule until DOE acts on establishing National Corridors. Section 216(c)(2) of the FPA requires that the Commission issue rules specifying the form of the application, the information to be contained in the application, and the manner of service and notice of the permit application on interested persons. While the Commission has no authority to issue a permit unless a facility is in a National Corridor, this does not affect the Commission's ability to put in place the filing requirements that will apply once National Corridors are designated. The Commission, therefore, declines to delay issuance of the Final Rule. The Commission believes that prompt issuance of the Final Rule, coupled with regional conferences to discuss its implementation, is in the public interest and provides

timely notice to stakeholders of the procedures that will apply to applications submitted under FPA section 216.

13. American Electric Power Service Corporation (AEP) requests that the Commission define what constitutes a National Corridor and whether the designation is a permanent one. Massachusetts Energy and Facilities Siting Board (Massachusetts Energy Board) requests that the Commission define the ends, geographic dimensions, and specified boundaries for a National Corridor. U.S. Department of the Interior (DOI) also requests clarification on what constitutes a National Corridor. The Commission declines to make such rulings. DOE, not the Commission, is responsible for designating and defining the National Corridors under EPAct 2005. Thus, it would be inappropriate for the Commission to establish an independent definition in the Final Rule or opine on whether a corridor designation is a permanent one.

B. Permit Findings

1. Commission Jurisdiction under 216(b)(1)

14. Under FPA section 216(b)(1), the Commission has the authority to issue permits to construct or modify electric transmission facilities if: (A) a State in which the transmission facilities are to be constructed or modified does not have the authority to: (i) approve the siting of the facilities; or (ii) consider the interstate

benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State; (B) the applicant for a permit is a transmitting utility under this Act but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or (C) a State commission or other entity that has authority to approve the siting of the facilities has- (i) withheld approval for more than 1 year after the filing of an application or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or (ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.

15. Numerous commenters request that the Commission specifically address what it will require of applicants to establish the basis and supporting rationale for the Commission's claiming jurisdiction over proposed electric transmission facilities.[8]

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[8]American Public Power Association (APPA), American Transmission Co. (American Transmission), California Resources Agency (CA Resources), Edison Electric Institute (EEI), Kentucky Public Service Commission (Kentucky PSC), New York Department of Public Service (DPS), New York State Senator Wright (Senator Wright), Southern Company Services (Southern Company), Southern California Edison Co. (SoCal Edison), Washington Energy Facility Site Evaluation Council (Washington Council), Western Energy Board, Western Governors, and the Wilderness Society (Wilderness).

Specifically, they request that the Commission clarify how it intends to determine when the clock starts and stops for the one-year time period for State action on siting requests under FPA section 216(b)(1)(C). They also request that the Commission clarify under what circumstances it will determine that a State has withheld approval and what conditions in a State authorization the Commission will consider sufficient to trigger Commission jurisdiction. The commenters also request that the Commission generally explain how, and when, it will make the determination that it indeed has jurisdiction over a proposed project.

a. One Year Clock/Pre-filing

16. Many commenters request that the Commission specifically address when the one-year period for State processing of an application will commence. They state that the Commission should specify that the one-year clock will not start running until the State determines that the application submitted to it is final and in compliance with the State's filing requirements.[9] Several commenters contend that the States should have the ability to re-start the one-year

[9]Allegheny Power (Allegheny), California Public Utilities Commission (California PUC), Iowa Utilities Board (Iowa Board), Massachusetts Energy Board, National Association of Regulatory Utility Commissioners (NARUC), Pennsylvania Public Utilities Commission (Pennsylvania PUC), Pepco Holdings, Potomac Electric Power Co., Delmarva Power & Light Co., and Atlantic City Electric Co. (PHI Companies), San Diego Gas & Electric (SDG&E), Western Energy Board, Public Service Commission of Wisconsin (Wisconsin PSC), and Washington Council.

review period if the applicant significantly modifies or makes substantive changes to its application.[10] The Wilderness Society (Wilderness) states that the Commission should require that the applicant prove that it made a good faith effort to comply with State siting and permitting requirements. The Western Energy Board requests that the Commission clarify that an applicant who has not obtained the required Federal permit findings in support of a State application has not filed a complete State application. Iowa Board states that one-year time period should not include periods of appellate review.

17. Several commenters also request that the Commission require an applicant demonstrate how its proposed application has met the statutory requirements for Commission jurisdiction prior to initiating the pre-filing process.[11] Others request that the Commission begin the pre-filing process while the State process is ongoing.[12]

18. Communities Against Regional Interconnect (Communities) contend that permitting the pre-filing

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[10]Iowa Board, NARUC, and Wisconsin PSC.

[11]CA Resources, Communities, Iowa Board, NARUC, New York PSC, Senator Wright, SoCal Edison, Washington Council, and Western Energy Board.

[12]APPA, AEP, Allegheny, Southern Companies, National Grid USA (National Grid), SDG&E, National Rural Electric Cooperative Association (NRECA), and Virginia Electric and Power Co. (Virginia Electric).

process to be initiated simultaneous with the ongoing State process represents nothing more then the Commission's desire to "pounce" at the moment its jurisdiction is triggered. Communities, CA Resources, and New York DPS are concerned that simultaneous filings could result in an unwarranted and massive expenditure of time and resources, if it turns out the Commission lacks jurisdiction to consider the application. Iowa Board contends that simultaneous filing deprives States of their authority and conflicts with the purpose of the law. Senator Wright and NARUC note that allowing the pre-filing process to begin at such an early stage prevents the Commission from fully considering the information brought forth during the State siting process.

19. The Commission appreciates the concerns of the States regarding the potential for overlap in State and Commission siting processes. However, the language of FPA section 216 provides for this potential overlap by allowing the Commission to issue a construction permit one year after the State siting process has begun and requiring an expeditious pre-application mechanism for all permit decisions under Federal law. Thus, the Commission pre-filing process can occur at the same time as parallel State proceedings.[13] To ensure that needed infrastructure is built, Congress therefore adopted a statutory scheme that permits parallel proceedings.

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[13]The Commission's pre-filing process is discussed in section II.D. of this Final Rule.

20. While we believe the statute clearly permits parallel Commission-State processes, after taking into account the comments of State agencies and other stakeholders, we do not adopt the approach proposed in the NOPR. Rather, we adopt an approach that is more fully respectful of State jurisdiction.

21. Although some overlap in State and Federal proceedings is inevitable, as was contemplated by FPA section 216, we believe that States which have authority to approve the siting of facilities should have one full year to consider a siting application without there being any overlapping Commission process. Therefore, we find that, in cases where our jurisdiction rests on FPA section 216(b)(1)(C),[14] the pre-filing process should not commence until one year after the relevant State applications have been filed. This will give the States one full year to process an application without any intervening Federal proceedings, including both the pre-filing and application processes. Once that year is complete, an applicant may seek to commence our pre-filing process. Thereafter, once the pre-filing process is complete, the applicant may submit its application for a construction permit. We believe this approach most adequately addresses State concerns. If we determine in the future, however, that the lack of a Commission pre-filing process prior to the

[14]In all other instances (i.e., where the state does not have jurisdiction to act or otherwise to consider interstate benefits, or the applicant does not qualify to apply for a permit with the State because it does not serve end use customers in the State), the pre-filing process may be commenced at any time.

end of the one year is delaying projects or otherwise not in the public interest, we will reconsider this issue.

22. The States also express concern that the one-year time period can be abused. For example, an applicant might not provide complete information to the States in the hopes of frustrating their ability to act within one year and, hence, invoking the Commission's jurisdiction. The Commission believes such instances should be rare. We also wish to make clear that we will not countenance such behavior. The Commission expects all potential applicants under FPA section 216 to act in good faith as it relates to State jurisdiction. Although the Commission may exercise jurisdiction in all instances where a State has withheld approval for more than one year, the Commission, in determining whether to do so, will weigh heavily clear evidence that an applicant has abused the State process.

23. Under the approach adopted herein, once the one-year time period has elapsed the applicant may commence pre-filing. At the pre-filing consultation required under § 50.5(b) of the Commission's regulations, the applicant will need to tell Commission staff the date that it filed its application and the status of that application. As part of the pre-filing consultation, the Director of the Office of Energy Projects (OEP) will review the applicant's progress at the State proceeding. After the initial consultation process, if the Director of OEP determines that there is sufficient reason to commence pre-filing, a notice will be issued under § 50.5(d) of the regulations. To

the extent the State proceeding is still ongoing, the Commission will host a scoping meeting or technical conference to work with the applicant and the State agencies to discuss the need to coordinate, among other things, simultaneous environmental reviews. We believe that such coordination is appropriate because, in some instances, the State may be able to complete its action while our pre-filing process is ongoing, possibly allowing us to terminate any proceedings under FPA section 216.

b. Withholding/Conditioning Approval

24. Numerous commenters request that the Commission define the criteria it would use to determine that a State has withheld approval or conditioned its approval so as to render a project not economically feasible, triggering Commission jurisdiction.[15] The Western Energy Board and California PUC maintain that a State should not be deemed to have withheld or unreasonably conditioned approval if it fails to act within one year because a project has not received Federal agency approvals or because of delays related to "another provision of Federal law." California PUC points out that FPA § 216(h)(4)(B) allows the Commission to extend its process beyond a year for those reasons.

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[15]Department of Interior, Iowa Utility Board, Massachusetts Energy Board, National Parks, National Regulatory Commissioners, Pennsylvania PUC, PJM, Washington Council, Wisconsin PSC, Western Energy Board.

25. The Iowa Board and Senator Wright state that the Commission should clarify that a State's timely and lawful denial of a transmission project should not give rise to Commission jurisdiction. The Iowa Board also contends that any other conclusion would allow an applicant to sidestep an adverse State ruling by subsequently requesting Federal jurisdiction. The Wisconsin PSC asks that the Commission clarify that State denial for failure to meet proper State requirements does not trigger the withheld approval provision. It claims that this would be a situation where a State agency acted properly and is not guilty of regulatory failure. Communities state that the Commission should not have jurisdiction where the State denies siting approval for valid reasons under State law, such as the protection of environmental resources, the health and safety of its citizens, or if better alternatives are identified through the process.

26. FPA section 216(b)(1)(C) provides jurisdiction to the Commission whenever a State has "withheld approval" for more than one year. The statute does not explicitly define the full range of State actions that are deemed to be withholding approval. Nonetheless, to promote regulatory certainty, we believe it is our responsibility to interpret the statutory language in this proceeding and to give all parties notice of such interpretation. To this end, we believe that a reasonable interpretation of the language in the context of the legislation supports a finding that withholding approval includes denial of an application.

27. Support for this interpretation is found in comparing the language added by EPAct 2005 as new FPA section 216(b)(1)(C)(i) to that of new FPA section 203(a)(5), also added by EPAct 2005. There, in requiring that the Commission grant or deny applications for approval of certain merger transactions within 180 days after the application is filed, the statute specifies the consequences "[i]f the Commission does not act." The Commission has an obligation to construe a statute in such a manner as to give every word some operative effect.[16] Interpreting the phrase "withhold approval" to mean "does not act" fails to recognize Congress' use of different words to express its intent.

28. Further support for this interpretation can be found in the fact that in addition to giving the Commission jurisdiction to site transmission facilities whenever a State has "withheld approval" for more than a year, FPA section 216(b)(1)(C) also gives the Commission jurisdiction to act in instances where a State has approved construction, but "conditioned its approval" in such a manner that the proposed construction or modification is not economically feasible. Since Congress has provided the Commission with the authority to intervene in circumstances where a State has issued an authorization which will essentially prevent a project from going forward, it would not be reasonable to interpret the statute in such a manner that would leave the Commission

[16] Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, 167 (2004).

without authority to intervene in instances where a State has expressly denied an application.

29. Moreover, legislative history lends support to this interpretation of the statute. Congress devoted substantial time to consideration of energy legislation in the years immediately prior to the enactment of EPAct 2005. It is noteworthy that transmission siting language first appeared in legislation considered in the House of Representatives in 2003. That measure (H.R. 6) allowed the Commission to exercise jurisdiction where a State entity with transmission siting authority "has withheld approval, conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce and is otherwise not economically feasible, or delayed final approval for more than one year after the filing of an application seeking approval . . . ."[17] In addition, the report language accompanying the above legislative text states, "The section provides that for such lines, persons may obtain a permit from FERC and exercise eminent domain if, after one year, a State is unable or refuses to site the line."[18] The fact that this precursor to the transmission siting provision of EPAct 2005 distinguished "withholding approval" from "delaying final approval for more than one year" and was interpreted to include a State "refusing to site a line" supports the conclusion that "withholding

[17]H.R. 6, 108th Cong. §16012 (2003).

[18]H.R. Rep No. 108-65 (April 6, 2003)(emphasis added).

approval" was intended to mean something beyond a failure to act.

30. Finally, Section 216(b)(1)(C)(i) allows the Commission to exercise jurisdiction where a State entity with siting authority has "withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law . . . ." If an applicant seeks State siting approval pursuant to applicable law, and the State does not grant the application within one year, the approval is withheld, regardless of whether the State takes a specific action denying it. Indeed, the term "withhold" in this context means to refrain from granting approval, and, conversely, the term "deny" is synonymous with "withhold." Webster's Third New International dictionary defines "withhold" as ".... to desist or refrain from granting, giving, or allowing . . . ." The same dictionary defines "deny" as ". . . to refuse to grant: WITHHOLD" [caps in original]. "Denial," similarly, is defined as "refusal to grant . . . : rejection of something requested." Furthermore, Roget's International Thesaurus 4th Ed., Section 776 ("Refusal") at paragraph 776.4 lists "deny, withhold, hold back . . ." as synonyms. Thus, there is no textual or lexical basis for saying that a formal denial does not entail refraining to grant or allow (i.e. to withhold). To say that an official denial does not count as a withholding is to say that "to deny" means something other than "to refrain from granting," which would not be a reasonable interpretation.

31. Therefore, the Commission finds that when a

State fails to act or rejects an application, it has withheld approval and the proposed facility would be subject to the Commission's jurisdiction. However, the fact that we possess jurisdiction does not mean that it will be exercised in all cases. Rather, we retain the discretion, in appropriate circumstances, to allow State processes to be completed beyond the one-year period provided in the statute. Indeed, under the approach describe above, the States will, in many cases, have more than two years to complete their action, and thereby avoid issuance of a construction permit by this Commission, because our pre-filing and construction permit processes typically take more than one year to complete (which is in addition to the one year provided to State authorities).

32. We also clarify that mere consideration of an application by the Commission does not equate to a jurisdictional determination or Commission approval of the proposed project. Once an application is filed for consideration by the Commission, anyone who questions the Commission's jurisdiction over the proposed project, the timing of the exercise of that jurisdiction, or the merits of the proposal can raise those matters in its intervention or protest. The Commission will make a jurisdictional determination and address comments and protests in a subsequent order issued on the merits of the proposed project.

33. Allegheny requests that the Commission address whether the following would constitute withholding approval: (1) a State cannot make a decision in one year due to State statutes or rules; (2)

the State has declined to establish a procedural schedule for reaching a decision within a year; (3) a State commission, after an elapse of one year, has not acted on an application; and (4) approval is conditioned in an unacceptable manner, but does not meet the significantly reduce transmission congestion or not economically feasible test. Wilderness states that the Commission should adopt detailed standards defining what constitutes an economically infeasible project or restrictions that prevent a proposed project from significantly reducing congestion. Communities argue that Commission jurisdiction should not be triggered simply because mitigation measures might increase the costs of the project. DOI also encourages the Commission to look closely at the reason that certain conditions were imposed on a project.

34. The Commission believes that these issues cannot be resolved adequately on a generic basis in this rule. Rather, it is important to consider all relevant factors presented on a case-by-case basis. The Commission will, therefore, not limit its ability to review an application on a case-by-case basis by establishing specific criteria that it will consider in determining if its jurisdiction had properly been invoked under FPA section 216(b)(1).

c. Other Jurisdictional Issues

35. PJM Interconnection (PJM) requests that the Commission address the Commission's jurisdiction over facilities that span multiple States where one State may have approved the facilities and another

does not. While the Commission's jurisdiction may, in these circumstances, only attach to the portion of the facility that would qualify under FPA section 216(b)(1), under the National Environmental Policy Act of 1969 (NEPA), the Commission would have to analyze the impact of the entire project. The Commission may, however, adopt State analyses where possible. Additionally, to make its determination under FPA sections 216(b)(2) through (6) the Commission would have to review the operation of the facility as a whole.

36. PHI Companies request that the Commission clarify that where a State does not have the authority to grant eminent domain rights for transmission facilities, that constitutes the State not having authority to approve the siting of facilities, thus giving a project sponsor immediate access to the Commission's jurisdiction. While State law may not authorize the taking of property by eminent domain, if it still has laws that address the siting of electric transmission facilities, it appears that the Commission's jurisdiction will not attach unless the State fails to act or denies an application as required by FPA section 216(b)(1)(C). We will, however, consider such issues if, and when, they arise.

2. Other Findings under 216(b)(2) through (6)

37. Under FPA sections 216 (b)(2) through (6), the Commission must find that the proposed facility: (1) will be used for the transmission of electric energy in interstate commerce; (2) is consistent with the public

interest; (3) will significantly reduce transmission congestion in interstate commerce and protect or benefit consumers; (4) is consistent with sound national energy policy and will enhance energy independence; and

(5) will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.

38. NARUC asserts that the final rule needs to state more clearly how the Commission will implement all five of the above criteria. Pacific Gas and Electric Company (PG&E) requests that the Commission clarify how it intends to measure and analyze sufficient showings related to consistency with the public interest and national policy. DOI and Laura and John Reinhardt (Reinhardts) request that the Commission define the criteria necessary to establish a basis for the public interest determination. Massachusetts Energy Board states the Commission should define "consistent with the public interest" to include that there is no superior approach to the identified transmission project; there is no superior alternative to the proposed route; and all feasible mitigation of environmental impacts and any adverse reliability impacts will be undertaken.

39. Wisconsin PSC states the Commission should examine a variety of factors, including cost-effectiveness, safety, engineering, project alternatives, individual hardships, reliability, competitive impacts, and environmental impact to judge whether a project

is in the public interest. PJM believes the Commission should specifically look at adding a reliability requirement and a market efficiency analysis. NARUC requests that the Commission consider the impact of the project on host States and any possible mitigation, and also require that harmful financial impacts of the project are mitigated through an applicable cost allocation methodology within the Commission's jurisdiction.

40. PSEG Companies contend that the Commission should define the term public interest to consider the energy and environmental policies of the States where the transmitted energy will provide power. It states that "significant" should be defined as it applies to the reduction of congestion and that "sound national energy policy" should be clarified to consider that national security concerns will be taken into consideration. Finally, PSEG Companies state that the criteria for approval should be on a cost-benefit basis and an applicant should specify whether the project is being built for reliability or for economic reasons because that could lead to a different evaluation. Wilderness asserts that the Commission's public interest determination should consider the benefits of electric transmission, the project's environmental impacts, and alternatives with less environmental impacts. Progress Energy (Progress) cautions the Commission to be mindful that a policy of maximum use of existing towers and structures should be conditioned upon maintaining or improving the reliability of the transmission system.

41. While commenters have raised a number of valid public interest considerations, the Commission cannot adopt an exclusive list of factors or construct a bright-line test to determine whether a project meets all the statutory criteria. It is difficult to construct helpful bright line standards or tests for this area. Bright line tests are unlikely to be flexible enough to resolve specific cases and to allow the Commission to take into account the different interests that must be considered. In reviewing a proposed project, the Commission will consider all relevant factors presented on a case-by-case basis and balance the public benefits against the potential adverse consequences. The Commission will conduct an independent environmental analysis of the project and determine if there is no significant impact as required by NEPA. It will look at alternatives, including, as appropriate, alternatives other than transmission lines, and consider whether the proposed facilities would maximize the use of existing transmission facilities. It will review the alternatives for their respective impacts on the environment and will determine mitigation measures to lessen the adverse impacts. The Commission will review the proposed project and determine if it reduces the transmission congestion identified in DOE's study and if it will protect or benefit consumers. It will investigate and determine the impact the proposed facility will have on the existing transmission grid and the reliability of the system.

42. The Commission will also consider the adverse effects the proposed facilities will have on landowners

and local communities. The Commission will evaluate the entire record of the proceeding, and after due consideration of the issues raised, determine if the proposed project is consistent with Congress' goals and objectives in enacting FPA section 216, while avoiding unnecessary disruptions to the environment and the unneeded exercise of eminent domain. The Commission's review of a proposed project will be a flexible balancing process during which it will weigh the factors presented in a particular application. It will impose appropriate conditions necessary to avoid adverse economic, competitive, environmental or other effects on the relevant interests from the construction of a new project, and will approve the project only where the public benefits to be achieved from the project outweigh the adverse effects.

43. PG&E states the Commission should rebuttably presume a need for a project subject to the independent oversight of an approved independent system operator (ISO) or regional transmission organization (RTO) without a direct economic interest in the application process. It contends that this will maximize efficiency as participants must already make showings of local or regional need to gain approval from an ISO or RTO. PSEG Companies encourages the Commission to incorporate the results of the RTO process into its proceeding. APPA asserts that if a project results from an open and collaborative regional planning process designed to meet the transmission needs of load-serving entities (LSE) within the national interest electric transmission corridors, or a consortium with broad LSE ownership/participation

then there should be a presumption of public interest. Similarly, NRECA contends that the Commission cannot reasonably make the FPA section 216(b)(2) through (6) findings unless the proposed expansion or modification arose from a truly open and inclusive joint transmission planning process. It requests that the Commission require an applicant to complete a joint planning process before beginning the pre-filing process.

44. The Commission agrees that the determinations of an independent entity, such as an RTO, should be given due weight in our assessment of whether a particular facility is needed to protect or benefit customers. We will, therefore, consider any such independent determinations as a factor, along with all other relevant factors, in determining whether the statutory criteria have been met.

C. Project Participation

45. Section 216(d) of the FPA requires that the Commission afford each State in which the transmission facility covered by the permit application is or will be located, each affected Federal agency and Indian tribe, private property owners, and other interested persons, a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit application. Additionally, under FPA section 216(h)(3) and its delegated authority, the Commission needs to coordinate the Federal authorization and review process with any Federal agencies, Indian

tribes, multistate entities, and State agencies that are responsible for conducting separate permitting and environmental reviews of the facilities.

46. Under the Commission's review process, any interested entity or individual will have multiple opportunities to participate and express its views on the proposed project.[19] Under § 50.4 of the Commission's regulations, the applicant is required to develop a Project Participation Plan (Participation Plan) to facilitate participation from all stakeholders during the Commission's proceedings. The Participation Plan will be used to provide accurate and timely information, including the environmental impacts, as well as the national and local benefits, of the proposed project, to all stakeholders. The Commission expects that the applicant will conduct various outreach activities to solicit comments on its proposal before commencing the Commission's review process.

47. In addition to the applicant's outreach activities, Commission staff will conduct its pre-filing process. As part of this process, Commission staff will start its scoping and environmental review of the proposed project as required by NEPA. As part of this review, it will seek comments and recommendations from interested stakeholders. Commission staff will use those comments during its preliminary review of the

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[19]The Commission considers any interested entity or individual to be included in its definition of stakeholder in § 50.1 of the Commission's regulations.

proposed project to formulate the issues raised by the project and to assist the applicant in compiling the information necessary for the Commission staff to draft the environmental document and for the Commission to address those issues during the application process.

48. Once the application is filed, it will be noticed and interested stakeholders will be able to file to intervene and/or file protests and/or comments concerning the applicant's proposal. Additionally, during the application proceeding, the Commission will issue a draft environmental document.[20] The environmental document will also be subject to a comment period where any stakeholder may file comments concerning the findings made in that document. Finally, the Commission will issue a final environmental document and an order addressing the issues raised in the proceeding.

49. The Commission received numerous comments on its proposal for public participation in its siting process. Many commenters requested clarification on how the Commission envisioned its notification requirements would be implemented, who would be notified about the project, and how an interested stakeholder would be able to access information and participate in the Commission's proceedings. Some

[20] The Commission will issue an environmental assessment under § 380.5 or an environmental impact statement under § 380.6 of the Commission's regulations depending upon the level of NEPA review that will be required for the proposed project.

commenters were concerned that the Commission's definition of affected landowners was too limited. Others thought it was too broad. Some commenters were afraid that their group may be excluded from the definition of stakeholder. Others thought a stakeholder's right to participate should be restricted.

1. Landowners

50. Under § 50.1, an affected landowner is an owner of property interests, as noted in the most recent tax notice, whose property is: (1) directly affected, crossed or used, by the proposed project; or (2) abuts either side of an existing right-of-way or proposed facility site or right-of-way, or contains a residence within 50 feet of a proposed construction work area. In addition, § 50.4(c) requires that the applicant notify any landowner with a residence within a quarter mile from the edge of the construction right-of-way.

51. Communities contend that the definition of affected landowner is too limited and must be broadened to provide a fair opportunity for intervention and a comprehensive environmental review. It states that it should include all landowners directly affected by the proposed facility so that all such individuals are allowed to participate fully in the proceeding. DOI requests that the definition of affected landowners include land management agencies. Similarly, National Parks Conservation Association (Parks Association) requests that the definition of affected landowner be reworded so that land managing agencies with fee simple lands and

those lands in which agencies own scenic easements, are notified during the appropriate times.[21] They contend that if the Commission does not include Federal agencies as "affected landowners," it needs to develop a notification criterion for Federal agencies that manage public lands. DOI also encourages the Commission to add a procedure for notifying stakeholders who would be within the viewshed, but not necessarily abutting, the proposal project to help notify other Federal governments and agencies involved in the project.

52. Parks Association requests that the reference to "directly affected" landowners in § 50.1(a)(1) needs to be defined since an electricity corridor might not cross or use parklands, but could still "directly" affect the scenic and historic resources of a park. It also states that a specific definition of "used" in § 50.1 should be added and include landowners whose property is exposed to noise and visual impacts. Moreover, Park Associations believes the quarter mile distance requirement is inadequate to address the possible adverse impacts on lands discussed in the land use, recreation, and aesthetics resource report. Massachusetts Energy Board requests that the Commission define affected landowner using a distance greater than 50 feet from overhead transmission lines or use a definition based on a distance from the edge of the cleared or permanent

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[21]Lackawaxen River Conservancy adopts the comment of the Parks Association.

right-of-way.[22]

53. The definition of affected landowner is meant to encompass owners of property either directly within or adjacent to the proposed right-of-way and construction area. If a land management agency manages land on or adjacent to the proposed right-of-way and construction area, it will be considered an affected landowner. While the definition only encompasses land on or abutting a proposed right-of-way, the applicant must also notify all landowners with a residence within a quarter mile of the edge of the construction right-of-way under the notification requirements of §50.4(c)(1). The Commission believes that between the definition of affected landowner and the expanded quarter mile notification requirement, a sufficient group of individuals will be notified of the proposed project.

54. Stakeholders do not need to be an affected landowner or live in a residence within a quarter mile of the proposed site to participate in the Commission's proceedings. Under the definition of stakeholder in § 50.1, any interested entity or person may file comments as a stakeholder and participate in the Commission's process. Even if a specific land management agency is not included in the definition of

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[22]Additionally, Massachusetts Siting Board also states that the word "and" should be replaced with "or" after the phrase "temporary workspace". We agree that the word "and" between the two requirements should be replaced with "or" and have changed the regulation accordingly.

affected landowner, it can still participate as a stakeholder. Resource Report 8, in § 380.16(j), requires that the applicant identify the existing land use in the vicinity of the proposed facility, including areas designated for studies under Federal law under § 380.16(j)(7). If, for some reason, a specific land management agency is not identified in the early planning stages of a project, as discussed below, during the pre-filing process Commission staff will work with the applicant to determine if any potential stakeholder has been missed and if they have, to make sure that they have had notice of the proposed project and an opportunity to participate.

55. Southern states that owners with property interests that abut an existing right-of-way should not be included in the definition of affected landowners unless it becomes necessary to secure easements or other rights from such owners. It argues that the definition should be limited to owners of property interests directly affected by the project and not to property interests that abut existing rights-of-way. Allegheny states that the Commission should only require notification of landowners with residence within 50 feet of a construction work site, as required under the affected landowner definition under the Commission's natural gas pipeline regulations in § 157.6(d)(2)(ii) and not expand the landowner group to residences within a quarter mile of the right-of-way as required under §50.4(c).

56. While property owners with land that abuts the proposed right-of-way or with a residence within 50

feet of the proposed construction work area may not be required to negotiate easements once the ultimate route is determined, one of the purposes of the pre-filing process is to review the applicant's proposed route and explore route alternatives and variations based on the input the Commission receives from property owners and other interested entities and individuals. It is important that potentially affected property owners are notified early on in this review process to provide the Commission with their views and recommendations as required under FPA section 216(d). Additionally, once construction commences, abutting property owners may be impacted by the construction activities conducted in such close proximity to their property and should be made aware of these activities.

57. The Commission also believes it is appropriate to notify all landowners within a quarter mile of the proposed right-of-way. Unlike gas pipelines which are generally buried underground, electric transmission lines can be seen from greater distances. Therefore, more surrounding landowners should be directly notified by the applicant. The fact that these landowners are not designated as affected landowners does not diminish their right to be notified and participate in the Commission's proceedings. Additionally, the Commission will also notify these individuals of its intent to conduct its environmental review and will seek comments from them during that review.

58. PG&E states that the Commission should defer

to States' distance requirements for notification of affected landowners. It requests that where there is no corresponding State requirement, the Commission should designate the appropriate minimum distance between the proposed project and a landowner's property that would trigger the direct notification requirement. National Grid recommends that the Commission only require notification within 300 feet of the construction right-of-way.

59. The Commission does not believe it is appropriate to defer to States' distance requirements for notification of affected landowners or that notification within 300 feet is sufficient to reach the broad group of participants that the Commission seeks to include in these proceedings. Moreover, having different requirements in different States may result in inconsistent requirements along the route of a multistate project.

2. Stakeholders and Notification

60. Section § 50.1 defines a stakeholder as a Federal, State, or multistate, Tribal or local agency, any affected non-governmental organization, or other interested person. In other words, a stakeholder includes agencies and individuals contemplated under FPA section 216(d) and the permitting agencies contemplated under FPA section 216(h)(3).[23] Under §

[23]Section § 50.1 defines a permitting entity as any entity, including Federal, State, Tribal, or multistate, or local agency that is responsible for conducting reviews for any Federal

50.4(c) the applicant is required to notify all known stakeholders, including affected landowners, of the proposed new facilities or modification of existing facilities within 14 days after the Director of OEP or his designee notifies the applicant of the commencement of the pre-filing process. Additionally, under proposed § 50.4(c)(1)(ii), the applicant must publish the notice of the pre-filing request and application filing twice in a daily or weekly newspaper of general circulation in each county in which the facilities will be located.

61. Communities states that while counties are technically included in the definition of a person under § 385.102(d) of the Commission's regulations they should, nevertheless, be prominently listed as stakeholders for the purposes of these regulations. Imperial states that as a political subdivision, it should be accorded stakeholder status. The Commission considers any interested entity or individual to be included in its definition of stakeholder in § 50.1 of the regulations. Thus, if a particular entity, such as a non-public utility or a county, is not specifically listed in the definition of stakeholder, it still may comment and participate in the Commission's proceedings.

62. SoCal Edison, PG&E, and NRECA request that the applicant provide electric utilities and affected

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authorization that will be required to construct an electric transmission facility in a national interest electric transmission corridor.

transmission owners and operators with notice and opportunities to participate in the process if they would be connected to an applicant's proposed transmission facility, provide service in the service area, or would be impacted, either by environmental, reliability or structural impact, as a result of the project. Western Energy Board requests that the applicant should also notify individuals who have expressed an interest in the State proceeding. It also requests that the Commission include a requirement for the applicant to periodically update the notification list as properties change hands.

63. The Commission agrees that electric utilities and transmission owners and operators that are connected to the applicant's proposed transmission facilities should be notified of the proposed project. We also believe it is appropriate for the applicant to notify individuals that have expressed an interest in the State proceeding, if a list of those individuals is available to the applicant. Accordingly, we will expand the notification requirement in § 50.4(c)(1) to include electric utilities and transmission owners and operators that are or may be connected to the applicant's proposed transmission facilities and any known individuals that have expressed an interest in the State proceeding.

64. Section 50.4(c)(3) requires that the applicant supply a stakeholder notice of the proposed project if a stakeholder is identified subsequent to the initial notice of the project. If a property changes hands during the pre-filing and application proceeding, the

applicant is required to notify the new owners once they are identified. We will not, however, require that the applicant actively monitor land sales along the project route to determine if a piece of property happens to be sold during the Commission's proceedings.

65. White Mountain Apache Tribe (White Mountain) recommends that the Commission require applicants to publish the notice of a pre-filing request in tribal newspapers when any part of the project will affect tribal lands. We agree and will add tribal newspapers to the notification requirement of § 50.4(c)(1)(ii).

66. DOI recommends that the notices published in the newspapers include a map of sufficient detail to allow the reader an immediate understanding of the general location or the proposed construction right-of-way. Section 50.4(c)(2)(i)(C) requires the filing of a general location map. The notice also provides information concerning how an individual can seek additional information if the information in the newspaper is not sufficient.

67. Affiliated Tribes of Northwest Indians (Affiliated) and White Mountain state that the Commission should assure that all Tribal entities whose traditional lands or cultural places are crossed by a potential project should be notified. National Grid states that the Commission should clarify what Tribal governments involved in the project means so the proper ones can be notified. Section 50.4(c)(1)

requires that the applicant notify tribal governments. We believe this is sufficient to address Affiliated's and White Mountain's concerns. We also do not believe any clarification of Tribal government is necessary. That information is readily available from the Bureau of Indian Affairs or the State or Tribal Historic Preservation Office. Moreover, as discussed below, part of the pre-filing process is for the Commission staff to work with the applicant to determine if any potential stakeholder has been missed and if they have, to make sure that they have had notice of the proposed project and an opportunity to participate.

68. EEI requests that the Commission limit the term stakeholder to an affected agency or person.[24] It contends that interested person could include a broad range of parties that are not impacted by the proposed project. Southern states that interested person should be reasonably and precisely drawn to clearly specify the scope of their participation, including actions these participants may take with respect to any project or application. National Grid states that the Commission should require stakeholders to provide notice to Commission staff and the applicant of the stakeholder's interest and intended involvement in the pre-filing process.

69. The Commission intends to seek comments from a broad group of participants during the pre-filing process. Once the application is filed the Commission will still entertain comments from interested entities

[24]PHI Companies supports EEI's comments.

and individuals. If anyone wishes to intervene in the application proceeding and become a party, however, they will need to file a motion to intervene in accordance with § 385.214 of the Commission's regulations. Under § 385.214(b)(2) the motion to intervene must show that the movant has an interest that is directly affected by the outcome of the proceeding.

70. Old Dominion Electric Cooperative (Old Dominion) is concerned that stakeholders will not receive sufficient notice of the commencement of the pre-filing proceeding because the Director of OEP will only notify the applicant under § 50.5(d). Old Dominion suggests, among other things, that the Director's notice be published in the Federal Register and be made available on the Commission's website. As discussed above, the Commission has modified the group of stakeholders listed in § 50.5(e)(3) that are required to receive notification of the Director of OEP's notice commencing the pre-application process from the applicant. Additionally, the notice will be available on the Commission's website. We find that is sufficient notification of the commencement of the pre-filing process.

71. Reinhardts request that the Commission require that the applicant file a formal affidavit with: a copy of the notice sent to landowners; a copy of the newspaper notices and list of publications where they appeared; and the names and addresses of all notified entities so that third parties are able to verify that the applicant has complied with the notice requirements.

Western Energy Board states that the applicant should be held to a higher standard than "good faith effort" for the notification of property owners. Affiliated contends that the notice requirements are insufficient because there are no penalties to assure that all stakeholders are identified at the beginning of the project. American Transmission asserts that the notification should be made on a good faith effort basis and stakeholders will have a reasonable opportunity to receive notice. NRECA states that the notification requirement should be deemed deficient if the applicant learns of additional stakeholders after the 14-day period.

72. Pre-filing is an information-gathering process. During this process, Commission staff will work with the applicant to make sure that all interested stakeholders have been made aware of the proposed project and have had an opportunity for their views and recommendations to be considered. Thus, part of the pre-filing process is for the Commission staff to review who the applicant has notified and to work with the applicant to determine if a potential stakeholder has been missed and if they have, to make sure that they received notice of the proposed project and an opportunity to participate. The Commission has successfully relied on this process in its review of hydroelectric and natural gas projects.

3. Document Availability

73. Under § 50.4(b), an applicant is required to make copies of all of its filings readily available for all

stakeholders to review at accessible central locations, either in paper or electronic format, and on the applicant's project website. Allegheny requests that the Commission add a provision comparable to those in the natural gas pipeline certificate regulations that reduce the applicant's service requirements if its materials include voluminous or difficult to reproduce material. The Commission agrees that if these materials are readily available at central locations and on the applicant's project website, it should not be required to serve these materials on all parties as required under § 385.2010 of the Commission's regulations. Thus, we will add § 50.4(b)(3) to the regulations to state:

> An applicant is not required to serve voluminous or difficult to reproduce material, such as copies of certain environmental information, to all parties, as long as such material is publicly available in an accessible central location in each county throughout the project area and on the applicant's project website.

4. Participation Process

74. As stated, under the Commission's review process all interested stakeholders will have numerous opportunities to present their views and recommendations with respect to the need for and impact of a proposed facility. Those opportunities include participating during the applicant's outreach

activities, during the Commission's NEPA process during both the pre-filing and application processes, and through the Commission's intervention and protest procedures during the application process. Numerous commenters raise concerns about their ability to participate in the pre-filing and application processes.

75. Reinhardts state that the Participation Plan should include information of how interested persons may be notified of dates and times for public meetings or hearings on the proposed project. Star Group (Star) states that the Participation Plan should identify the means by which stakeholders will be given the opportunity to meet with the applicant to attempt to understand and resolve key issues. American Transmission believes the Commission should give more guidance concerning what constitutes a complete Participation Plan. Old Dominion requests that the Commission require the applicants provide a summary of stakeholder participation to date in the Participation Plan, including concerns expressed by stakeholders, and efforts by the applicant to address those concerns.

76. The Commission expects that the applicant will have conducted outreach activities at the planning and/or State level prior to commencing the Commission's pre-filing process. The Participation Plan must detail all of the outreach activities the applicant has done to date and summarize the input it received during that outreach. It also must include a list and schedule of all pre-filing and application

activities the applicant is planning, including, among other things, consultations, information gathering, and proposed location(s) and date(s) for the meetings. The applicant must also describe how it intends to keep the stakeholders apprised of any updates to its Participation Plan, including, but not limited to, postings to its project website and how the stakeholder can reach the company's contact to seek additional information.

77. Parks Association and DOI request that the Commission require applicants to release a pre-route proposal before the pre-filing process begins for a permit. One of the purposes of the pre-filing process is for Commission staff to work with the applicant and interested stakeholders to determine the ultimate route of the proposed project. Moreover, for siting proceedings that are initiated in a State proceeding, stakeholders will already have some idea of the approximate route from that proceeding. The Commission does not believe it is necessary to add yet another level of notification to an already potentially lengthy process.

78. PSE&G and Allegheny request that the Commission establish a docketed, publicly-noticed proceeding for pre-filing or use a technical conference to assure that stakeholders will be afforded a formal opportunity to present their views. New Jersey Board of Public Utilities (New Jersey BPU) requests that the Commission provide for videoconferencing of the meetings. Old Dominion states that the Commission should not only fix the time by which interventions are

due, but also provide a fixed time for interested parties to file comments or protests to applications. Communities, Old Dominion, and Star are concerned that the pre-filing process does not provide an opportunity to give any meaningful input to the Commission. Communities argue that without notice and comment during the pre-filing process or transparency in the Commission's decision-making process, intervenors and the public will be significantly handicapped in their efforts to meaningfully participate once the formal application process begins. They are also concerned that interested parties and the public will not have any intervention rights or any comment rights during the pre-filing process.

79. The Commission's pre-filing procedures offer numerous occasions for stakeholders to express their interests and make meaningful contributions. Once the Commission commences the pre-filing proceeding, it will assign a docket number to the project. All the applicant's pre-filing materials will be posted under that docket number in the Commission's eLibrary and will be available through the Commission's website. All subsequent filings made in that docket by the applicant, any comments filed by stakeholders in that docket, and any issuances made by the Commission in that docket, including notices and requests for additional information will be posted on eLibrary under that docket number.[25]

[25]Information concerning how to use the Commission's services can be found on the Commission's website at www.ferc.gov and will also be included in the notices the

80. Once the Commission staff establishes that the applicant has filed sufficient preliminary information to proceed with pre-filing, the Commission will issue a notice of intent (NOI) to prepare an environmental document. The NOI will describe the project, list potential issues identified by the Commission staff,[26] and explain the Commission's scoping and environmental review process. It will explain how to participate in the Commission's process by submitting written comments. The notice will set a date by which time the comments will be due. It will also list the scoping meetings the Commission staff will hold at various locations throughout the proposed project route to access the maximum amount of participation possible. The Commission will have a transcriber at its scoping meeting to create a record of the comments received at that meeting.

81. Depending on the issues that arise during the course of pre-filing, Commission staff may determine that it is necessary to hold various technical conferences or other meetings to acquire additional input and information concerning the proposed project. The Commission will issue notices of these meetings in the docket number assigned to the project. Additionally, the applicant will need to update its

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Commission issues concerning the proposed project.

[26]The list of issues may be modified during the environmental review process based on the comments received during the Commission staff's analysis.

Participation Plan to reflect any additional outreach that may be conducted as part of the Commission's review process. If the Commission determines it is appropriate, it could arrange to provide for videoconferencing of certain meetings. However, because the Commission conducts various meetings along the route of the proposed project, videoconferencing should not be necessary. Additionally, transcripts of the meeting will be available under the assigned docket in eLibrary and the Commission's website

82. AEP is concerned that there is no limit on stakeholder input in the pre-filing process. It states that stakeholders can push for revisions and continue to ask questions, which continue to postpone a project. AEP recommends that the process should be modeled more like a rulemaking with time-limited input. EEI asserts that the applicant should not necessarily be obligated to communicate with parties that have not demonstrated that they will be impacted by the proposed project. Southern states that the obligation to entertain requests for information should be limited in scope and in terms of the participants that may request additional information or else it would lead to significant delays.

83. During pre-filing, the Commission will solicit comments from stakeholders. Any notice issued by the Commission soliciting comments will include a deadline date for those comments. The Commission expects that the applicant will address stakeholder concerns in various ways. Under § 50.4(a)(1), the

applicant is required to have a point of contact within the company to answer general inquiries that may arise. The applicant can also establish a link on the project website that addresses frequently asked questions and refer the inquiry to that link or other areas on the website to address inquiries, as appropriate.

84. Based on the comments received in response to the NOI and information gathered on visits to the site of the proposed project, Commission staff will work with the applicant to compile the information and conduct the studies necessary for the Commission staff to prepare a draft environmental document. Once the Director of OEP has determined that sufficient information has been gathered for the Commission to proceed with the final review of the applicant's proposed project, pre-filing will end and the applicant will file an application.

85. Once the application is filed, it will be noticed and interested entities and individuals will be able to file to intervene and become a party to the proceeding under Subpart B of Part 385 of the Commission's regulations. Instructions on how to do this will be explained in the notice of the application and are available on the Commission's website.

86. American Transmission requests that the Commission allow State, local, and regional planning and siting entities to participate in the proceeding as a matter of right. Communities state that local counties that will be impacted by the proposed

facilities should have automatic rights to intervene and receive notices and information. NRECA contends that the Commission should coordinate closely with the Rural Utilities Service to avoid duplication and the imposition of additional burdens on applicants.[27]

87. Under § 385.214 of the Commission's regulations, any State commission, Advisory Council on Historical Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any State fish and wildlife, water quality certification, or water rights agency, or Indian tribe with authorization to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding. The Commission sees no reason to expand this regulation. All other interested persons may seek intervention by filing a motion to intervene.

88. DOI raises several issues pertaining to the timing of the draft environmental document under the NEPA. Specifically, it is concerned as to when other Federal agencies will get an opportunity to review the draft document. It encourages the Commission to include a timeframe for public review of the NEPA document along with clarification as to when the Commission will issue the NEPA document. After the

[27]The Rural Utilities Service provides capital to upgrade, expand, maintain, and replace America's vast rural electric infrastructure. NRECA states that financing obtained through the Rural Utilities Service is subject to rigorous long-term planning obligations that are substantially more demanding than the resource adequacy requirements that apply to other LSEs.

application is filed, the Commission will issue a draft environmental document, on which interested stakeholders will be able to comment. All comments received will be addressed in the final environmental document which will be completed before the Commission issues an order on the merits of the application.

89. When the Commission completes its review of the application, it will issue an order addressing the issues raised in the proceeding and issuing, or denying, a permit to construct the proposed facilities. Under FPA section 313(a) and § 385.713 of the Commission's regulations, any party may file a request for rehearing. Requests for rehearing must include the information required under § 385.719(c) of the Commission's regulations. The Commission will issue an order addressing the issues raised in the rehearing requests. If the Commission denies the rehearing requests, any party who intervened in the proceeding and is aggrieved by the Commission's order may file, under FPA section 313(b), an appeal in the United States Court of Appeals.

D. Pre-filing

90. The purpose of the pre-filing process is to facilitate maximum participation from all stakeholders to provide them with an opportunity to present their views and recommendations with respect to the need for and impact of the facilities early on in the planning stages of the proposed facilities as required under FPA section 216(d). In addition to gathering stakeholder

input, during this time Commission staff will work with the applicant to compile the information required for a complete application under §§ 50.6 and 50.7.

91. The filing requirements in §§ 50.6 and 50.7 set forth the basic information that the Commission will need for a generic project. However, each project will have its own unique issues that will need to be considered on a case-by-case basis. For example, an electric transmission facility constructed through farmland will have a different impact than one that will go through a heavily populated area. During the pre-filing process, Commission staff will initiate its independent environmental analysis of the project as required by NEPA. It will conduct scoping meetings and site visits. Staff will use the information gathered through this process and from information acquired from stakeholder input to define the issues particular to a specific project. Based on these activities, Commission staff assists the applicant in compiling the information necessary for the Commission to address the specific concerns raised by the proposed project during the application process.

1. Initial Consultation Issues

92. Section 50.5(b) requires that an applicant meet with the Director of OEP before filing its pre-filing materials. During the consultation process, Commission staff will review the applicant's proposed project description, including the status of the applicant's progress towards collecting the data needed to commence the pre-filing process, and any

preliminary contacts the applicant has had with stakeholders, including its progress in DOE's pre-application process and in the State proceeding, if applicable.

93. Commission staff will review the applicant's eligibility for Commission jurisdiction for a permit for the proposed facility, outline the pre-filing process, and provide guidance as to what further work is necessary to prepare the pre-filing request. Commission staff will also review the proposed project to determine if the applicant will be required to hire a third-party contractor to assist in preparing a NEPA document under the direction of the Commission staff.

94. Virginia Electric requests that the Commission explain what will be reviewed by staff in the initial consultation and when such reviews will take place. American Transmission request that the Commission define what constitutes a complete set of pre-filing information to assist in expediting the process.

95. While any applicant may seek guidance on a potential project from Commission staff at any time, the Commission expects that the applicant will commence the initial consultation process for pre-filing when it believes that there is sufficient evidence that a proposed project will be subject to the Commission's jurisdiction and it has prepared the required pre-filing information. At the pre-filing consultation, Commission staff will review the applicant's specific project and the information the applicant has compiled to date and discuss how that information complies

with the initial pre-filing filing requirements in § 50.5(e) and the application filing requirements in §§ 50.6 and 50.7. Commission staff will also review what work the applicant has done at the State level, the amount of community outreach the applicant has conducted, and the results of that outreach.

96. While the potential differences between projects make it difficult for the Commission to specifically define what would constitute complete pre-filing information, § 50.5(e) lists the minimum filing requirements that are needed for an applicant to commence the pre-filing process. If the Commission staff find that the applicant has sufficient information to comply with the pre-filing filing requirements in § 50.5(e), the applicant will be allowed to commence pre-filing. If the applicant does not have sufficient information to meet the pre-filing filing requirements, Commission staff will work with the applicant to determine what additional information will be needed to proceed. If the applicant does not have the necessary information, it may take more than one pre-filing consultation before the applicant is prepared to commence pre-filing.

97. EEI argues that rather than requiring applicants to develop and implement an extensive new pre-filing public Participation Plan, the Commission should simply require the applicant to provide appropriate notification to stakeholders that the venue for the siting approval process has moved from the State to the Federal level along with an explanation of how they can become involved in the Commission's

process as an intervenor or under NEPA. SDG&E recommends that an applicant should be able to bypass the pre-filing stage, if at the initial consultation with the Director of OEP it is determined that it has submitted sufficient information with OEP to support beginning to process the application, has submitted a Participation Plan, and has complied with the pre-filing requirements of § 50.5(e). PHI Companies similarly suggests the pre-filing process should be optional.

98. Because pre-filing is a fact-finding process used by the Commission staff to commence and initiate its independent environmental analysis and to define specific issues raised by specific projects, it is not possible for an applicant to by-pass the process. However, the time it takes for an applicant to complete the pre-filing process could be significantly reduced depending on the amount of work the applicant had completed in compiling the necessary information prior to the pre-filing process.

99. PJM requests that the Commission staff commence its system analysis review of the proposed facilities during the pre-filing process. Commission staff primarily focuses on compiling the information for the subsequent environmental review during pre-filing. In cases where a project would be located in the geographic area covered by an RTO, we expect much of the information for the system analysis to be developed in consultation with the RTO during the pre-filing phase. If necessary, however, Commission staff will work with the applicant during pre-filing to

identify specific information that will be required for the Commission to conduct a system analysis during the application process.

2. Third-party Contractors

100. Under § 50.5(c)(6) the applicant is required to propose at least three third-party NEPA contractors for the Commission to consider for the proposed project. Under § 50.5(d)(1), the Director of OEP's pre-filing notice will designate the chosen third-party contractor at the beginning of the pre-filing process.

101. Southern states that the applicant should be entitled to select any third-party NEPA contractor to use in its pre-filing and application process, insofar as the Director of OEP determines that a third-party contractor will be necessary. Similarly, National Grid states that an applicant should be permitted to express a preference for a particular contractor and the Commission's staff should generally defer to the applicant's choice because the applicant is financially responsible for the contractor's work. Los Angeles DWP is concerned that the requirement to finalize the contract with the third-party contractor may take 90 days or longer unless one of the four NEPA contractors selected who is currently under contract with the Los Angeles DWP. American Transmission requests that the Commission clarify why it requires that third party contracts be finalized in two weeks in all cases; instead it recommends that it should be 45 days. DOI requests clarification or a reference to the criteria that the Commission will use to determine if a third-party

contractor must be hired.

102. The Commission is required under NEPA to do an independent analysis of the environmental impacts of a proposed project. Depending on the amount of work involved, it often requires that the applicant hire a third-party contractor to assist the Commission in analyzing the proposed project. The third-party contractor, while paid for by the applicant, reports directly to Commission staff. Thus, the Director of OEP will designate the appropriate third-party contractor.[28] While § 50.5(e)(2) requires that the applicant finalize the contract with the selected third-party contractor within 14 days the Commission may waive that requirement rule for good cause. If the applicant cannot finalize the contract with the third-party contractor within two weeks, it can request a waiver of the requirement of § 50.5(e)(2). We note, however, that preparation of an environmental document is a time and labor intensive process. The Commission has implemented the 14-day requirement as a way to expedite the process.

3. Subsequent Filing Requirements

103. Section 50.5(e) lists the initial filing requirements and filing deadlines that are required for the Commission staff to commence the pre-filing

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[28]See 40 CFR 1506.5(c), requiring that a contractor used to prepare an environmental impact statement is to be chosen solely by the lead agency (or where appropriate, by a cooperating agency).

process. Parks Associations is concerned that this language does not impose strict deadlines to protect the public interest. On the other hand, National Grid requests that the Commission permit reasonable extensions of time beyond the 60-day timeframe for submitting resource reports.

104. The deadline requirements in the regulations are intended by the Commission to expedite the pre-filing process. Since part of the pre-filing process is to assist the applicant in compiling the information needed to file a complete application, the Commission does not expect that the preliminary resource reports filed at the beginning of the pre-filing process will contain every detail required for the ultimate report that will need to be filed with the application. The resource reports required in § 50.5(e)(7) should be preliminary reports that contain sufficient information for Commission staff to commence the pre-filing process and specifically the NEPA process. Commission staff will work with the applicant throughout the pre-filing process to develop all the necessary information for each resource report. It should be noted, however, that delays in filing these materials may delay the decision to allow an application to be filed.

4. Lead Agency Issues/Coordinating Federal Permits

105. Effective May 16, 2006, DOE delegated paragraphs (2), (3), (4)(A)–(B), and (5) of FPA section 216(h) to the Commission as they apply to proposed

facilities in designated national interest electric transmission corridors.[29] Specifically, it delegated lead agency responsibilities for the purpose of coordinating all applicable Federal authorizations and related environmental review and preparing a single environmental review document for facilities in a National Corridor.

106. PJM states that the Final Rule should promote coordination among Federal agencies and the resolution of disputes among Federal agencies. AEP states that while the Commission developed well-defined procedures for interacting with State agencies, it should also coordinate siting for the various Federal agencies. DOI requests clarification on whether there are two separate pre-filing processes (one led by DOE and one led by the Commission). Western Energy Board raises similar concerns regarding the duplication of the two processes.

107. As stated, several Federal agencies including DOE and the Commission entered into a MOU to establish a framework for early cooperation and participation that will enhance coordination of all applicable land use authorizations, related environmental, cultural, and historic preservation reviews, and any other approvals that may be required under Federal law in order to site electric transmission facilities. The MOU requires participating agencies, to the extent practicable, to commit to early involvement and cooperation to ensure that timely decisions are

[29]Supra note 5.

made and that the responsibilities of each agency are met. The Commission intends to work with DOE and the participating agencies to ensure that all Federal permit decisions are rendered in a timely manner.

108. National Grid states that the Commission should request that DOE delegate lead agency status to the Commission at the time the Commission's pre-filing process begins rather than at the filing of an application. Virginia Electric states that the Commission should try to amend its delegated authority to transfer DOE's pre-application coordination to the Commission or coordinate and use DOE's pre-application process to the maximum extent practicable as its own pre-filing process. It contends that anything else may require the applicant to duplicate its agency review activities with the Commission and DOE. EEI requests that the Commission explain the timing and coordination of its lead agency authority with DOE and clarify that filing requirements from permitting agencies be relevant, and preferably significant.

109. We anticipate working closely with DOE and other Federal agencies under the terms of the DOE MOU to coordinate all Federal actions and to ensure that DOE's and Commission's processes interact seamlessly and with as little duplication of effort as possible. We expect that we will coordinate with DOE on an ongoing basis on general issues regarding these matters, as well as on specific cases. In light of this, we see no need to seek amendment of DOE's delegation order.

110. Progress contends that the Commission should exercise lead agency authority in circumstances where Federal agencies are impeding the construction of new transmission facilities regardless of whether the State still has jurisdiction or if it is outside a National Corridor. California PUC similarly urges the Commission to use its lead agency authority to get Federal agencies to expeditiously review applications during the time an application is filed at the State level. PSE&G encourages the Commission not to overstep its statutory authority in this regard.

111. Under DOE's May 17, 2006 delegation order, the Commission is responsible for acting as lead agency when an applicant has submitted an application to the Commission to construct or modify electric transmission facilities. Thus, the Commission's lead agency delegated authority only pertains to facilities subject to the Commission's jurisdiction in National Corridors. DOE retains lead agency authority for coordinating Federal action on facilities not subject to the Commission's delegated authority.

5. Timeframe for Pre-filing

112. Because of the potential for differences between projects, the Commission does not propose to set exact timeframes for the pre-filing process. The timeframe will depend upon, among other things, the size of the project, stakeholder participation, the applicant's preparedness, and the applicant's progress at the State level. The Commission expects that the pre-filing

process for large, multistate "greenfield" projects, will take longer than the pre-filing process for minor modifications to existing facilities.[30] The Commission anticipates that the pre-filing process for extensive projects may take a year to complete. Additionally, the environmental resource reports required under § 380.16, discussed below, will require comprehensive field work to compile the information necessary to comply with the Commission's obligations under NEPA.

113. Southern states that the Commission should acknowledge that the time required for processing applications will vary and that the Commission may also lack authority to require any deadline is met. American Transmission states that the Commission should create a definitive timeline for the submission of information and for the receipt of responsive action by Commission staff. DOI also urges the Commission to establish a chronological timeline to assist applicants and permitting entities to better understand the timing of steps within the permitting process. EEI opposes a uniform pre-filing process schedule. Allegheny states that minor modifications should not require a full-blown pre-filing process.

114. Northern Wasco County Peoples Utility District and Seattle City Light state that since major transmission projects entail long lead-times for land acquisition, procurement, design/engineering and

[30]Greenfield facilities are facilities that primarily will be located in new rights-of-way.

construction, they are concerned that the rule may unnecessarily prolong the amount of time required to take action on project applications. SDG&E states that the rules should embody the urgency reflected in the statute that energy security may be at stake due to delays in transmission siting. EEI requests that the Commission explain the variables in determining how long the pre-filing and NEPA processes will take. Allegheny states that a two-year process for authorization is too long for extensive, reliability-driven transmission projects.

115. As stated in the NOPR and above, because of the potential differences between projects, the Commission cannot establish or predict timeframes for electric transmission projects proceedings. NEPA requires the Commission to conduct an independent environmental analysis of a proposed project. The Commission's NEPA analysis may require a more stringent review of the environmental impacts than is required at the State level. The pre-filing timeframe is dependent upon how far along the applicant is on compiling the information needed by the Commission, the complexity of the project, and what additional information will be required based on the specific issues raised for the individual project. The Commission agrees that time is of the essence in the siting of these facilities. Thus, it believes that it is incumbent on a project sponsor and States to work together in an attempt to site the facilities at the State level. This would be the most expeditious way to site the facilities.

6. Review of Director's Decisions in Pre-filing

116. Under § 50.5(f), the Director of OEP will determine when there is sufficient information for the applicant to file its application. Old Dominion requests that the Commission provide an opportunity for stakeholder comment before the OEP Director determines that the pre-filing process is complete. Allegheny states that since the Commission had delegated broad authority to OEP, it should provide potential applicants with an opportunity to seek Commission review of OEP's decisions. Southern states that the Commission should add a review process to allow applicants to review and challenge a determination by the Director of OEP. It claims that an absence of due process could lead to court challenges. DOI requests that Federal agencies be consulted prior to the conclusion of the pre-filing process.

117. Stakeholders have various opportunities to comment during the pre-filing process. Therefore, we do not believe it is necessary to add any additional round of comments. Moreover, once the pre-filing process is complete, the applicant will be filing an application for Commission review of the proposed facility which will be noticed and subject to the Commission's intervention and protest procedures. As a general matter, the Commission relies on its staff to develop the record necessary for the Commission to act on energy project applications, and it does not anticipate entertaining interlocutory appeals

regarding the Director of OEP's pre-filing decisions.

E. Application Requirements

118. Pennsylvania PUC states that for a more informed process the Commission should include procedures whereby the application would publicly disclose what information or data the application has omitted. Section 50.2(c) requires that the applicant provide all information required in Part 50 unless it shows that the information is not necessary. We find that this is sufficient to address the concern raised by Pennsylvania PUC.

119. NRECA states that entities seeking permits should be required to show that all requirements are met, including Federal, State, and Tribal permitting requirements which would be consistent with the natural gas regulations. Section 50.2(d) is identical to the requirement in § 157.5(c) and no further modification is necessary.

F. Filing Requirements

120. Section 50.6 lists the general requirements that need to be met when filing an application for a permit. Section 50.6(e) requires that the applicant demonstrate how its proposed project would satisfy the requirements of FPA section 216(b)(2) through (6). The Commission will review this information in addition to the technical information provided in the Exhibits submitted under § 50.7 in making its findings concerning the proposed project. As stated, the filing

requirements in §§ 50.6 and 50.7 are the basic information that the Commission will need for a generic project. However, each project will have its own unique issues that will need to be considered on a case-by-case basis. An applicant may request a waiver of a specific requirement if it believes it may not be applicable to its particular project. Similarly, the Commission may request additional information if it deems it is necessary to address issues raised by a proposed project.

121. Various commenters raised issues concerning the Commission's need for specific requirements in each of the exhibits. Some requested that the Commission require additional information. Others question the Commission's need for some of the required information. Several commenters request that the Commission accept the record from the State proceeding to satisfy some of the Commission's filing requirements.

1. State Record

122. The Commission received numerous comments requesting that it maximize the use of information, notices, and materials produced during the State siting process to avoid the costly duplication of materials. [31]

[31] Communities, American Public Power, EEI, PHI Companies, PSE&G, NARUC, Allegheny, SDG&E, National Grid, American Transmission, SoCal Edison, Pennsylvania PUC, Western Governor's, Virginia Electric, PPL Electric, and California PUC.

Specifically, Allegheny states that the Commission should not require an applicant to notify stakeholders, conduct public meetings, and submit studies of information that are duplicative of State commission requirements. PHI Companies contend that, at a minimum, the Commission should allow for a waiver of various pre-filing and application steps that the applicant can demonstrate have been satisfied in the State proceeding. Committees request that the Commission require that the record already developed for any State permitting authority be filed and included in the Commission's record.

123. California PUC states that the Commission should incorporate the findings from the State siting process into its proceeding. SDG&E asserts that the Commission should accept the State's environmental review to the extent it satisfies the requirements of NEPA and to rely on prior NEPA analysis performed as well. Pennsylvania PSC states that the Commission should incorporate the work of already-existing planning processes conducted either by regional State organizations or RTOs. SoCal Edison recommends that the Commission adopt generally applicable standards for the submission of previously collected materials to expedite the process. PPL Electric urges the Commission to rely on the aid of State officials to navigate the State siting procedures.

124. It is our expectation that by working with States, applicants, Federal agencies and other stakeholders on an ongoing basis, we will be able to ensure, to the maximum extent possible, that

information developed in State proceedings can be used, where appropriate, at the Commission, thereby increasing efficiency and lessening burdens on all parties.

125. While the Commission will accept any pertinent information developed in the State proceeding or elsewhere into its record, the Commission is required under NEPA to do an independent review of environmental impacts. The Commission will take all filed information into consideration as it conducts its review. Similarly, it will consider the State findings while it considers its own findings under FPA section 216(b). Its ultimate determination on whether to issue a permit, however, will be based on the entire record developed in the Commission proceeding after due consideration of all the issues raised.

2. Exhibits

126. Section § 50.7 contains the requirements for the exhibits that must be filed with the application. The exhibits will contain the technical data needed for the Commission's analysis of the application. All the environmental data required under Part 380, specifically the Resource Reports required under § 380.16, will be filed as proposed Exhibit F. Engineering data and system analysis data must be filed in Exhibits G and H.

127. The Massachusetts Energy Board recommends that the Commission add another exhibit that would require that the applicant submit construction

information including: construction procedures; construction schedules; plans to coordinate with local authorities; construction noise impacts and noise mitigation; mitigation of wetland impacts of construction; plans for mitigation of the traffic impacts of project construction; and plans to inhibit unauthorized travel on the right-of-way. These are all required to be filed under the environmental requirements in Exhibit F or will be addressed in the Commission environmental analysis. Therefore, additional exhibits are not necessary.

128. Affiliated contends that either § 50.6 or § 50.7 should require an exhibit which describes all tribal interests in the project and outcomes from all Tribal stakeholder participation in the project pre-filing activities and any issues discussed and whether they were either resolved or unresolved and details of the resolution or breakdown in discussions. Tribal governments or agencies are required to be notified at the beginning of the pre-filing process. In addition, information concerning tribal interests are required under § 360.16(f) and § 360.16(j). The Commission believes this is sufficient basic information for the Commission to commence its review of a proposed project. As stated, each project will raise its own unique issues for which the Commission may request additional information if it deems it is necessary to address particular issues raised by a proposed project. Any information developed during the pre-filing process will be made part of the record and will be considered by the Commission as it conducts its substantive review when an application is

subsequently filed.

a. Exhibit E – Maps

129. Section 50.7(e) states that the format for maps will be determined during the initial pre-filing consultation. American Transmission contends that the Commission should use a uniform format that satisfies other government agencies and avoids redundancy. Because technology changes over time, the Commission will not specify a specific format in its regulations. Particular formats will be addressed during the initial pre-filing consultation. Additionally, a potential applicant may contact Commission staff at any time for guidance on the Commission's required formats.

b. Exhibit F – Environmental Requirements

130. The Commission is required to conduct an environmental analysis of a proposed electric transmission project under NEPA. Exhibit F requires that the applicant file the environmental information required under Part 380 of the Commission's regulations. As stated, the filing requirements are the basic information that the Commission will need for a generic project. However, each project will have its own unique issues that will need to be considered on a case-by-case basis. At the pre-filing consultation and throughout the pre-filing process, Commission staff will work with the applicants and stakeholders to determine the issues that arise for each project.

Depending on those issues, the Commission staff may require additional information. Conversely, if certain of the filing requirements are not needed for certain projects, Commission staff will consider whether waivers are appropriate for those requirements.

131. Massachusetts Energy Board states that the Commission should include regulatory procedures for evaluating alternatives to a project, minimizing environmental impacts, and denying a permit to construct a project that has significant avoidable adverse impacts. The principal purposes of the Commission's environmental review are to: (1) identify and assess the potential impact on the natural and human environment that would result from the implementation of a proposed project; (2) identify and recommend reasonable alternatives, including, as appropriate, alternatives other than transmission lines, and specific mitigation measures to avoid or minimize environmental impact; and (3) encourage and facilitate public involvement in the environmental review process. During the application process, the Commission will review the analysis created in the environmental document in concert with the other information analyzed during its review process to determine if it is in the public interest to issue a permit to construct the facilities. If it determines that it is not, it will deny the application.

132. Reinhardts state that the Commission should broaden its rules and its area of inquiry to reasonably justify whether one State or region should suffer the significant environmental and aesthetic burdens

associated with large transmission infrastructure to bring economic benefit and pollution reduction to another. The Commission's mandate under the FPA is to determine if the proposed facility is consistent with the public interest on a national level. It may be that a transmission facility will cross several States in order to benefit consumers in other States. The fact that the facility may not benefit the State's crossed by the facility is not determinative on the Commission's decision if the facility benefits a broader region.

133. Communities state that the applicant should be required to demonstrate a good faith attempt to negotiate access, and if access is denied, provide thorough research of all available documentation regarding the property. The Commission expects that the applicant will attempt to negotiate access to as much of the proposed right-of-way as possible for survey purposes. It is in landowners' best interests to allow the applicant access and to get involved in the pre-filing process to have input in the ultimate alignment of the proposed facility. During the pre-filing and application processes, there is more flexibility to achieving shifts in alignment of the proposed facility to accommodate individual landowner needs on their property.

i. Section 380.5 - Actions that Require EAs

134. Section 380.5 (b)(14) provides that under certain circumstances the Commission may prepare an

environmental assessment (EA) instead of an environmental impact statement (EIS) for a proposed project. American Transmission seeks clarification on whether the Commission will allow applicants the option of preparing a preliminary applicant-prepared environmental assessment. The Commission will decide if an EA or EIS is applicable for a proposed project. If the Commission determinates that an EA is appropriate, the Commission will accept an applicant-prepared preliminary draft. After reviewing the draft, the Commission may still require a third-party contractor to assist with finalizing the draft NEPA document.

ii. Section 380.6 Actions that Require EISs

135. Section 380.6 requires that an EIS be prepared for major electric transmission facilities using a right-of-way in which there is no existing facility.[32] Affiliated proposes that the Commission also add "for which there are likely to be endangered species impacted, substantial issues under the National Preservation Act, or a significant impact to the natural or human environment." The Commission will require

[32]Section 380.6 also lists when EISs are required for natural gas pipelines and hydroelectric projects. AEP requests that the Commission eliminate the references to pipeline projects. Those sections were added to assure the proper placement of the semicolons and the word "and". They have no other purpose relative to electric transmission siting.

an EIS for these and several other reasons. The decision on what needs to be addressed in the EIS generally is determined on a case-by-case basis based on the information complied during the pre-filing process. We do not believe it is appropriate to add language that could be interpreted to limit the Commission's discretion to prepare an EIS.

136. Virginia Electric contends that the Commission should delete the "major" before "transmission facilities" in §380.6 because FPA section 216 confers jurisdiction to the Commission over all electric transmission facilities. The word major in §380.6 denotes when the Commission will prepare an EIS under §380.6 as opposed to an EA under §380.5. The Commission will still review all proposals for electric transmission facilities under its FPA jurisdiction.

iii. Section 380.10 – Participation in Commission Proceeding

137. In § 380.10(a)(2)(iii), the Commission clarified that interventions should not be filed in natural gas pre-filing proceedings and in the proposed electric transmission pre-filing proceedings. Old Dominion points out that while interested parties cannot intervene in the pre-filing phase, they can submit comments. New Jersey BPU states that this section should reference the stakeholder participation provided in §§ 50.4 and 50.5 to clarify that stakeholders have the right to be involved in the

process. Section 380.10(a)(2)(iii) already refers back to the pre-filing activities under § 50.5. We do not believe any further reference to that section is necessary.

iv. Resource Report 1 – General Requirements

138. Resource Report 1 requires that the applicant describe, among other things, the facilities associated with the project, special construction and operation procedures, and construction timetables. National Grid contends that whether a project is going to be built in an existing right-of-way should dictate the amount and type of data needed on construction methods, workspace, and related matters. As stated, specific projects will be considered on a case-by-case basis. Projects constructed in an existing right-of-way will raise different issues than a greenfield facility.

139. Section 380.16(c)(2)(i), requires maps and photos covering at least a one-half mile wide corridor centered on the electric transmission facility centerline. Communities contend that a fair definition of the area of impact should begin with a minimum of one-half mile and require an evaluation of the extent beyond that point for each type of impact. National Grid states that the map and photos should be consistent with the State's corridor requirements. The Commission uses the one-half mile distance as a generally acceptable distance for its map requirements. On a case-by-case basis, it will determine the extent of the area of impact based on

the specific information gathered during the review process.

140. Section 380.16(c)(2)(i) requires United States Geological Survey (USGS) 7.5-minutes series topographic maps or maps of equivalent detail. The Massachusetts Energy Board contends that these maps are not adequate for a detailed evaluation of impacts in densely populated areas and requests a better resolution of detail than USGS-based maps. We agree that the impact of a proposed facility in a densely populated area will raise different issues than a facility located in a rural area. The Commission will address the issues, as necessary, in each individual proceeding before the Commission.

141. The Center for Biological Diversity requests that the general content requirement include a full lifecycle assessment and air quality and greenhouse gas emissions. It contends that the Commission's NEPA analyses must address the full lifecycle of electric generation and include analysis, mitigation measures, and alternatives that address air quality impacts, energy losses, criteria pollutants, and greenhouse gas emissions. The Commission will review these impacts of the proposed facilities, as required by NEPA and all other relevant environmental laws.

v. Resource Report 2 – Water Use and Quality

142. Section 380.16(d) requires that the applicant describe water quality and provide data sufficient to determine the expected impact of the project and effectiveness of mitigation, enhancement, or protective measures. DOI urges the Commission to review the regional impact from local water use. EEI states that the requirement that the applicant identify known public and private groundwater supply wells or springs is inappropriate for above-ground facilities. AEP contends that the Commission should eliminate this requirement because it only pertains to pipeline projects. National Grid states that the Commission should grant requests for waiver for this report for overhead electric transmission projects where no water use or quality effects would occur.

143. The construction of electric transmission facilities will create ground disturbance that may disrupt groundwater in the area of the construction. Thus, the Commission will require that the applicant comply with the requirements of this section.

vi. Resource Report 3-Fish, Wildlife, and Vegetation

144. Section 360.16(e) requires that the applicant file information describing aquatic life, wildlife, and vegetation in the vicinity of the proposed project. Massachusetts Energy Board requests that the Commission require applicants to provide habitat information obtained from State natural heritage officials. Section 360.16 (e)(8) requires that applicants

include correspondence from, among others, State fish and wildlife agencies. We believe this is sufficient to address Massachusetts Energy Board's concern.

145. DOI requests that the applicant identify Federal- and State-listed threatened or endangered species in the project area and the impacts to such species in this report. It also requests the section be expanded to require mitigation for invasive species. Sections 360.16(e)(4) and (5) require that the applicant address specific areas of significant habitats or communities of species of special concern to the Federal- and State- listed or proposed threatened or endangered species or critical habitat, respectively.

vii. Resource Report 4 – Cultural Resources

146. Section 360.16(f) requires that the applicant file the information needed for the Commission to determine that it has complied with the requirements of the National Historic Preservation Act (NHPA). Wilderness states that Resource Report 4 should explicitly state that the project must comply with section 106 of the NHPA. DOI requests that the report should be expanded to cover nationally and regionally significant historical and cultural resources. It also believes the report should cover the potential construction impacts on archeological sites which may be present in the identified project site.

147. Resource Report 4 is specifically designed to gather all the information necessary for the

Commission to comply with NHPA section 106. We do not believe it is necessary to specifically state this in the list of information that the Commission requires the applicant to file. Resource Report 4 requires that the applicant provide the information requested by DOI. Moreover, the Commission's environmental review document will cover the potential impacts on the identified sites.

148. Communities state that there is no valid reason for allowing the delay in the filing of certain reports until immediately before the permit is issued. They contend that all such reports should be filed with the application or the application may be deemed incomplete until such filings are made. The Commission does not believe it is necessary that the applicant have all the cultural resources reports and plans completed before it issues a permit. Under some circumstance where access to private property is denied, the applicant will not have access to the property to complete the report until after the permit is issued and the applicant gains access by eminent domain. The Commission will not authorize construction, however, until permittee has complied with all the requirements of NHPA and all other relevant environmental laws..

149. National Grid contends that the Commission should grant requests for waiver of Resource Report 4 if overhead electric lines are on existing rights-of-way. Regardless of the location of the facilities, the Commission will still need to comply with NHPA section 106.

vii. Resource Report 5 – Socioeconomics

150. Section 360.16(g) requires that the applicant provide information concerning the impact of the proposed project on the towns and counties in the vicinity of the project. Section 360.16(g)(2) requires that the applicant evaluate the impact of any substantial immigration of people on governmental facilities and services, and plans to reduce the impact on local infrastructure.

151. EEI states that electric transmission line construction typically does not involve a large influx of workers into an area, so a requirement for an evaluation of the impact of the immigration of people and a fiscal impact analysis evaluating incremental local government expenditures is unnecessary. The construction of any major energy infrastructure facility has the potential to require some influx of workers into the areas. Depending on the facilities available, number of employees, and duration of their stay they may have a major impact on communities. This may especially be the case with the expedited construction we expect for permitted projects.

152. Under § 360.16(g)(7), the applicant is required to conduct a property value impact analysis of the proposed transmission line for residential properties located adjacent to or abutting the right-of-way. Numerous commenters recommended expansion or deletion of the proposed property value impact analysis.

153. EEI requests that the Commission delete the requirement for a property value impact analysis for residential properties located adjacent or abutting to the proposed right-of-way. National Grid asserts that requiring property value impact for these facilities is unwarranted and it would serve only to promote and fuel not-in-my-backyard sentiment. It also contends that assessing property values for virgin right-of-ways would be very time consuming with no tangible benefits.

154. Virginia Electric states that there is no consensus to support a conclusion that transmission lines have any impact on real property values and that the type of property value impact studies in this regulation would overstate, by double-counting, the normal right-of-way cost for the project. SoCal Edison believes such a requirement would be highly subjective and could significantly delay approval of a transmission facility. EEI is concerned that a property value impact study would be highly subjective and could further complicate negotiations and communication between the transmission project sponsor and homeowners in the vicinity of the project. AEP states that the Commission should reconsider requiring this information because it will be time-consuming and the conclusions would be highly speculative.

155. EEI and SoCal Edison assert that there is no similar requirement in the Commission's regulation regarding the siting of other energy infrastructure.

SoCal Edison states that such an analysis is not required by NEPA. EEI, National Grid, and SoCal Edison also note that this type of information is not generally required at the state level.

156. Communities requests that the analysis include all landowners, residential and commercial, within the entire area of impact and should require a fiscal impact analysis on both local and regional economies. Wilderness recommends that the Commission's analysis use the methods described in "Socio-Economic Framework for Public Land Management Planning: Indicators for the West's Economy". In addition, it requests that the assessment consider the potential impacts on the values of public lands.

157. After considering the comments raised in this proceeding, the Commission agrees that the property value impact analysis should be eliminated from the Final Rule. The Commission believes that requiring such information could significantly delay the development of transmission projects, which is contrary to the national interest. The Commission also is concerned with the accuracy of such studies and the fact that no uniform methodology is available to calculate the impact of transmission lines on property values. In many cases, such studies could be highly speculative and inaccurate while providing limited beneficial information to the public. Finally, the Commission agrees that there is no particular rationale why such a study should be required when it is not required for other infrastructure projects before the Commission or generally required at the State

level.

158. Given the speculative nature of these reports and the time and resources the application would need to dedicate towards completion of this study, the Commission does not believe such a requirement is consistent with the purpose of EPAct 2005. The Commission will consider such information when provided in making a determination on the project, but such information will not be required.

ix. Resource Report 6 – Geological Resources

159. Section 350.16(h) requires that the applicant describe geological resources and hazards in the project area that might be directly or indirectly affected by the proposed action or that could place the proposed facilities at risk, the potential effects of those hazards on the facilities, and methods proposed to reduce the effects or risks. National Grid states that this requirement should be eliminated for overhead electric transmission line projects and required only for underground projects, where the nature of the facility makes such analysis relevant and appropriate.[33] Construction of electric transmission facilities will require the placement of towers subject to substantial loads in areas with potential geological

[33]DOI requests that Resource Report 6 address impacts to local aquifers or water sources which may supply water to local communities. These impacts are specifically addressed in Resource Report – 2 – Water use and quality.

hazards that the Commission would want to take into account in its analysis. Therefore, we will not eliminate this requirement.

x. Resource Report 7 – Soils

160. Section 360.16(i) requires that the applicant provide information on the soils that will be affected by the proposed project, the effect on those soils, and measures to minimize or avoid impact. EEI, AEP, and National Grid contend that the Commission should eliminate this requirement because electric transmission projects will have no significant impacts on soil. We disagree. Whenever there is ground disturbance and the possibility of erosion, the Commission needs to determine the potential impact of that activity.

161. DOI recommends that this report include a requirement to identify highly erodible soils. Section 360.16(i)(1) requires that the applicant list the soil associations that would be crossed and describe, among other things, the erosion potential. We think this adequately addresses DOI's concern.

xi. Resource Report 8 – Land Use, Recreation, and Aesthetics

162. Section 360.16(j) requires that the applicant describe the existing uses of land within a quarter mile

of the edge of the proposed right-of-way and changes to the land use if the project is approved. It also requires that the applicant list all buildings within a half-mile of the center of the proposed right-of-way. Communities state that the Commission should clarify in the regulation that not only must existing land use be evaluated but also all permitted land use. Under § 360.16(j)(3), the applicant is required to provide information on "planned development" in the project area, which is defined as development included in a master plan or on file with local planning authorities and would included permitted land use.

163. DOI requests that this report include identification of the loss of agricultural/grazing property within the project area. Section 360.16(j) requires that the applicant address changes to those land uses that will occur if the project is approved.

164. EEI states that the requirement that the applicant submit information regarding a corridor that is one-half mile wide is unnecessarily broad, and could pose an undue burden on the applicant, and would exceed the study corridor width used in many States. It contends that the appropriate corridor width will vary from State to State depending on topography, the nature of development in the vicinity, and other factors. Therefore, it requests that the Final Rule be modified to permit the applicant to propose a corridor width that takes these factors into account. In the alternative, EEI states that the Final Rule should be modified to require information be provided for a corridor that is 200 feet wide, an approach that it

states is consistent with current practice in certain States. Southern raises similar concerns. AEP states that the Commission's land use requirement of a quarter mile would be excessively costly. DOI also requests that the Commission explain the justification for the quarter-mile distance requirement.

165. The Commission believes that it is reasonable to require preliminary information on land uses and inhabited buildings within a half-mile corridor along a proposed transmission line. Having information about such areas from the outset will enable the Commission to more efficiently examine minor routing alternatives or modifications. In some instances, based on a review of the preliminary materials and information gained during the scoping process, the Commission may request additional information.

166. Section 350.16(j)(4) requires that the applicant identify various areas including, among others, sugar maple stands, orchards and nurseries, game management areas, national or State forest, parks, golf courses, or recreational or scenic areas. Massachusetts Energy Board requests that the Commission add cranberry bogs after orchards and nurseries. The Commission will consider additional areas that need to be identified on a case-by-case basis depending on the proposed project.

167. Wilderness requests that the Commission lands managed by the Bureau of Land Management, the National Park Service, and the U.S. Forest Service be specifically listed as requiring information in Resource

Report 8. It contends that the regulations should emphasize the protection of the special values of public lands. Section 360.16(j)(4) requires that the applicant identify all lands owned and controlled by Federal or State agencies, as well as land owned by private preservation groups in addition to parks and recreation areas. We believe this sufficiently covers the areas of concern raised by Wilderness in its comment. If Wilderness believes that something was overlooked when a applicant makes a specific filing, it can file comments during the Commission's scoping period.

168. EEI states that the Commission's requirement that the applicant identify Indian Tribes that may attach significance to the project's right-of-way is broad and vague and should be removed. It contends that there are transmission lines that are hundreds of miles long and that it would be difficult to determine the "project vicinity". EEI asserts that the cultural resources consultations with Native Americans required in§ 380.16(f) and the requirement that the applicant identify Native American religious sites and cultural properties in § 380.16(j)(4) should be sufficient to assure that appropriate consideration is given to the impacts on tribal resources of a proposed transmission facility.

169. Affiliated states that the applicant should provide names of all Indian tribes who may have permit authority or the ability to consent to, or withhold consent over, any aspect of the project. Affiliated also asserts that the rule should describe the

different interests tribes have in projects, either as permitting and consenting entities inside the external boundaries of reservations, or outside of reservations on tribal traditional lands or cultural places. It should also explicitly cite, describe, and inform other stakeholders of the Commission's tribal obligations, identify treaty rights, and any other tribal interests that may be impacted by the proposed project. Confederated Tribes of the Warm Springs Reservation of Oregon (Confederated Tribes) requests that the Commission require an applicant to identify treaty rights and any other tribal interests that may be impacted by the proposed project in § 380.16(j)(5).

170. As discussed above, the Commission believes that the filing requirements concerning tribal interests under § 360.16(f) and § 360.16(j) and the notification requirements under §50.4(c) are sufficient to provide the basic information for the Commission to commence its review of a proposed project.

171. Pre-filing is an information gathering process. During this process, Commission staff will work with the applicant to make sure that all interested stakeholders, including any tribes, have been made aware of the proposed project and have had an opportunity for their views and recommendations to be considered. Any issues particular to a proposed project will be raised and evaluated during the pre-filing process. Information developed during the pre-filing process will be made part of the record and will be considered by the Commission as it conducts its review when an application is subsequently filed.

172. Southern contends that the requirement in § 350.16(j)(6) to list all schools, homes, and other structures within one-half mile of a proposed facility and AM radio transmitters within 10,000 feet imposes an enormous burden with no discernible benefit. We disagree. It is more efficient for Commission staff to consider the land use and aesthetic issues within a wider area than to prematurely narrow the focus of the evaluation and scoping process. Any lesser requirement might require the applicant to do a more expansive review later in the process in response to stakeholder comments which could potentially extend the processing time for the proposed project.

173. Section 380.16(j)(11) requires that the applicant describe the visual characteristics of the lands and waters affected by the project. EEI states that significant visual impacts are inherent in virtually all transmission line construction and cannot be avoided or minimized in most cases. Therefore, it argues that the Commission's requirement that the applicant describe how the facilities will impact the visual character of the project right-of-way and list measures to lessen these impacts should be modified to clarify that an applicant must only propose measures to lessen such impacts "to the extend practicable." The Commission understands that it is difficult to lessen the impact of an electric transmission facility and will consider visual impacts on a case-by-case basis, but nevertheless needs visual impact information to complete its NEPA and public interest analysis.

174. National Grid states that the Commission should change this report to require the applicant to identify and give a general description of the surrounding areas and describe the effect of the proposed project on those areas. A general description of the surrounding areas is not sufficient for the Commission's land use review. As stated, it is more efficient for the Commission to consider land use issues within a wider area.

xii. Resource Report 9 – Alternatives

175. Section 380.16(k) requires that the applicant describe alternatives to the project and compare the environmental impacts of the alternatives. Center for Biological Diversity wants to ensure the full environmental impacts of the alternatives are considered. National Grid states that the Commission should clarify that the applicant is only required to prepare resource reports for proposed projects, not alternatives. American Tra.ısmission requests that the Commission specify what is meant by all alternatives, including the identity of the number of alternative routes that must be considered. AEP states that Resource Report 9 would require excessive research, including costly environmental analyses, to be completed on an undefined and seemingly limitless number of alternative routes. Southern states that it is not clear how much information an applicant needs to collect to review and report on alternatives and that it could lead to an enormous burden.

176. For the preliminary reports required at the early stages of pre-filing, the applicant need only submit information that would allow Commission staff to discern reasonable alternatives. As the Commission conducts its site visits and reviews the comments submitted during the scoping period, alternatives will be considered. Once the applicant reaches a decision regarding its final proposed route, it will need to comply with the resource report requirements for that route before the application is filed.

177. Wilderness states that alternatives should be identified to avoid the locations identified in Resource Report 8 or to explain why they could not be avoided altogether. It also requests that a transparent comparison of costs and environmental impacts should be included in this section. The purpose of the Commission's NEPA analysis is to analyze the potential environmental impacts of a proposed project and reasonable alternatives to that project. Section 380.16(k) requires that applicants describe and evaluate alternatives including a discussion of costs and benefits. While the avoidance of impacts to special land use areas is not specifically addressed in the resource report, it will be explored through the course of the NEPA review.

178. APPA states that non-wires alternatives should be thoroughly evaluated "up front" during the interregional planning process and should not be among the alternatives evaluated by the Commission in the construction permit application process. Massachusetts Energy Board, New Jersey BPU, and

Pennsylvania PUC all request that the Commission consider alternatives beyond new transmission lines, including configuration and design alternatives, upgrades to existing transmission facilities, and demand side alternatives. Reinhardts suggest the Commission consider "system alternatives" to a proposed project as opposed to just route alternatives. California PUC contends that the Commission should consider alternatives inside and outside the National Corridors and use all the information on alternatives developed in the State siting process. Communities requests that the Commission require the applicant to evaluate all technologically achievable alternatives.

179. NEPA requires the Commission to consider and discuss reasonable alternatives; it does not require consideration of patently unsuitable alternatives.[34] The Commission's experience in the hydropower and gas pipeline programs is that the range of reasonable alternatives can best be determined based upon the facts of a specific siting proposal. In light of the specific facts raised by individual projects, the applicant will be required to address a variety of alternatives in the resource reports, including, where appropriate, alternatives other than new transmission lines. Moreover, reasonable alternatives can be identified by Commission staff or other stakeholders at various points during the proceeding for consideration in the NEPA process.

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[34]See American Rivers v. FERC, 201 F.3d 1186, 1200 (9th Cir. 2000).

xiii. Resource Report 10 – Reliability and Safety

180. Section 380.16(l) requires that the applicant address potential hazards to the public and how these will affect reliability. Communities request that the report include an evaluation of homeland security issues and whether the project will result in energy independence. Homeland security related issues will be addressed on a case-by-case basis.

181. Southern states that the Commission should not require an applicant to include a discussion on potential acoustic or electric noise from electric and magnetic fields (EMF). National Grid contends that since these requirements are duplicative of local requirements, the Commission should waive the requirements where the applicant can demonstrate that comparable requirements are being complied with at a local level. As discussed above, an applicant may use any information developed during its planning stage and for the State proceeding to satisfy the Commission's filing requirements. However, it must clearly explain and demonstrate how that information complies with the Commission's specific requirements.

xiv. Resource Report 11 – Design and Engineering

182. EEI states that the requirement that the applicant submit detailed design and engineering

drawings showing all major project structures is inconsistent with typical industry and State permitting practice which is to only submit pole spotting or spacing information and general consideration of structure type when siting authorization is sought. It states that detailed engineering is then completed after a proposed transmission project is authorized. EEI contends that electric transmission lines are subject to specific field designs along their entire length to accommodate particular circumstances. Therefore, it states it would be more appropriate for the Commission to require the submission of detailed engineering information after a permit is issued rather than beforehand. National Grid states that this requirement should be modified to require only maps of the proposed siting route and drawings depicting the predominate type of structures to be used.

183. The Commission expects the applicant to be able to commence construction when the Commission issues the permit. The applicant can develop its design during the pre-filing phase, but the Commission expects that all design plans should be well-defined when it files its application.

184. Massachusetts Energy Board requests that the Commission require applicants to provide an explanation for any selection of a structure design that is different from structures already present and an explanation of any structure placement that is longitudinally offset from existing structures. Resource Report 1 requires that the applicant describe

the facilities associated with the proposed construction. If the Massachusetts Energy Board believes additional information is required for a specific project, it should file comments during the NEPA scoping process and those comments will be addressed in that proceeding.

c. Exhibit G – Engineering Data

185. The Commission requires specific engineering data to support its review of a proposed transmission line in Exhibit G. National Manufacture's contend that flexibility should be allowed in the permit application facilities description because the design will probably not be finalized at the time of permit application. It also notes that filings have historically been made 5 to 10 years before the final design is completed. The Commission expects that the applicant will be prepared to commence construction when the permit is issued. Thus, it will need to have all its final designs completed prior to when the Commission issues an order on the merit of a proposed project.

186. Massachusetts Energy Board states that the Commission should require applicants to provide: (1) existing and expected EMF cross-sectional profiles for points along a proposed project and identify any low-cost mitigation of EMF; (2) information on interference with existing cathodic protection systems; (3) an analysis of noise levels; (4) engineering data on substations and switching station that would be

constructed or altered in connection with the transmission line project; and (5) any other information that has been identified as a requirement component of siting review or of an application to construct in the State in which the facility will be located. DOI also requests the Commission review the potential environmental impact of noise.

187. The information Massachusetts Energy Board and DOI recommend the Commission should require applicants to provide is already required by Resource Report 10. Should other pertinent information be identified during the State siting process, this information may be filed for consideration by the Commission.

d. Exhibit H – System Analysis Data

188. Exhibit H requires information to evaluate the impact the proposed facilities will have on the existing electric transmission system performance, including an analysis of existing and expected congestion, power flow cases which include contingency data files, a list of assumptions and guidelines used in the cases, a stability analysis, a short circuit analysis and a concise analysis that explains how system reliability will be improved, how long-term regional planning is impacted and how congestion will be impacted on the applicant's entire system.

189. Communities state that system analyses should include all relevant reliability assessments completed

by State commissions, ISO, RTO, energy service companies and the like. New Jersey BPU states that the Commission analysis should include input from a RTO/ISO (if applicable) because they are in the best position to analyze the impact new facilities will have on overall system performance. In determining whether to issue a permit to construct the proposed facilities, the Commission will review all processes that were conducted by the applicant with the relevant stakeholders in determining whether to approve the proposed facilities, including input from RTOs and ISOs.

190. Reinhardts contend that the Commission must consider how interstate transmission will impact electricity available to individual States and regions. They state that the Commission's rules must include data requirements that would shed light on potential reliability issues. They also assert that the rules should: (1) require full disclosure of all electric generation (new or existing) for which the new transmission facilities have been proposed; (2) require that alternatives to the proposed transmission include alternative electric generation scenarios; and (3) require a detailed analysis of all impacts that would be imposed by construction of the desired interstate transmission resources that are expected to feed into the new transmission facilities to meet identifiable power needs. APPA and PJM suggest more details concerning the reliability criteria the Commission will use to approve projects. PSEG Companies and APPA contend that there is a need for a broad congestion analysis.

191. The Commission anticipates that DOE will designate corridors to help connect existing generation to load. In most cases, the proposed project will be limited to transmission facilities designed to achieve this purpose. The Commission's decision on the proposed project will take into account the applicant's submitted reliability and systems analysis, an analysis of alternatives, and an analysis of project impacts as required by NEPA. Additionally, based on the specific issues that arise in individual projects, the Commission may request additional information to assure that the proposed project is in compliance with any Commission-approved reliability standard.

e. Exhibit I – Project Cost and Financing

192. Exhibit I requires general information concerning the cost of the proposed project. Communities state that the applicant should provide a detailed analysis of the projected cost impact on customers both inside and outside the National Corridors. California PUC states that the description of project financing should identify the specific mechanisms by which the applicant will seek cost recovery, what categories of ratepayer costs would be recovered from, and what rate or other incentives the applicant proposes to seek. It contends that this will provide adequate transparency regarding the financial impact of the project on the State or region.

193. Cost recovery and the effect on customer rates

are not part of the proceeding to issue a construction permit. The Commission will address issues related to the costs associated with the proposed facilities in separate rate proceedings filed under FPA section 205.[35] Any concerns about cost recovery should be raised in those proceedings.

G. Critical Energy Infrastructure Information

194. Information filed during the pre-filing and application proceedings will likely contain critical energy infrastructure information (CEII). Under § 50.4(c)(5), access to this information is subject to the CEII requirement in § 388.113 of the Commission's regulations.

195. Western Energy Board,[36] NARUC, and CA Resources contend that the Commission should recognize that State agencies with permitting or other regulatory authority with respect to a project are distinguishable from individuals or businesses seeking CEII information for their own private interests. They state that such agencies are invested by statute with safeguarding the public interest and as such, have a

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[35]See, e.g., Allegheny Energy, Inc., 116 FERC ¶ 61,058 (2006), American Electric Power Service Corp., 116 FERC ¶ 61,059 (2006). See also Promoting Transmission Investment through Pricing Reform, 71 FR 43294 (July 31, 2006); FERC Stats. & Regs. ¶ 31,222 (2006).

[36]Washington Council adopts the comments of the Western Energy Board.

need to know with respect to CEII, and should not be required to demonstrate a need for the CEII when requesting this material. In their filings, they make various recommendations for changes to the Commission's CEII regulations.

196. On September 21, 2006, in Docket No. RM06-23-000, the Commission issued a notice of proposed rulemaking regarding its regulations for access to CEII.[37] Copies of the comments submitted by Western Energy Board, NARUC, Washington Council, and CA Resources have been place in the official record in Docket No. RM06-23-000, and will be addressed in that proceeding.

197. DOI requests the Commission include a definition of CEII along with an identified procedure for obtaining CEII. The Commission finds that the reference in § 50.4(c)(5) to the CEII regulations § 388.113 is sufficient to direct the reader to the Commission's procedures concerning CEII.

H. Accepting/Rejecting Applications

198. Under § 50.8(b), the Director of OEP may reject an application that does not comply with any applicable statute, rule, or order as provided for under § 385.2001(b) of the Commission's regulations. Allegheny requests that the Commission impose a 10-day deadline for the rejection of applications as

[37] Critical Energy Infrastructure Information, 71 FR 58321 (Oct. 3, 2006); FERC Stats. & Regs. ¶ 32,607 (2006).

required under § 157.8(a) of the Commission's natural gas regulations. The Director of OEP will either notice the application or reject it, in a timely manner. Assigning an arbitrary deadline for these actions is not in the interest of an applicant who is earnestly trying to perfect an application.

I. Hearings

199. Section 50.3(e) states that the Commission will conduct a paper hearing on applications for permits for electric transmission facilities. NARUC contends that the regulations do not provide for notice and an opportunity for a hearing as required under FPA section 216(b). They argue that the major portion of the Commission's examination of the application and the participation of the States occurs in the pre-filing process and that the applicant, not the Commission, is tasked with deciding what kind of participation process will provide interested persons an opportunity to be heard. They state that because the majority of the evaluative work performed with respect to the application will occur before the hearing process ever begins, the Commission will deprive interested persons of the ability to participate in a fair and open process. NARUC also states that during the pre-filing process the applicant can make its case to the Commission before interested persons can intervene, test the information provided by the applicant, and provide their own analysis without being subject to the Commission's ex parte restrictions.

200. Pre-filing is an information-gathering process.

The Commission will assign a docket number at the beginning of the process. All filings made in that docket from both the applicant and stakeholders will be available for anyone to comment on. During this process, Commission staff will work with the applicant to make sure that all interested stakeholders have been made aware of the proposed project and have had an opportunity for their views and recommendations to be considered. The Commission staff also will start its environmental scoping and review process. During this process, Commission staff will conduct public meetings and/or technical conferences and work with the applicant and all stakeholders to formulate the issues raised by a particular project and to compile the information that will be needed by the Commission to address those issues when it conducts the substantive review of the proposed project during the application process. During pre-filing, Commission staff will be available to provide guidance on the process to both the applicant and any interested stakeholder.

201. Once the Commission staff determines that there is sufficient information for the Commission to evaluate the proposed project, the applicant will file its application. At that point, the hearing envisioned under FPA section 216(b) will commence. The application will be subject to the Commission's notice, intervention, and protest requirements. Based on the information in the application and the information compiled during the application proceeding, the Commission will evaluate the proposed project and issue an order on the merits. Thus, any interested stakeholder will have numerous opportunities to

participate not only informally during the pre-filing process, but also formally during the application process.

202. Southern contends that a paper hearing should not preclude an evidentiary hearing in the event that circumstances dictate one. Iowa Board similarly argues that paper hearings should not foreclose the possibility of a live hearing if it is more appropriate. New Jersey BPU states that the Commission should determine the nature of the hearing depending on the circumstances, including whether material issues of fact are in dispute that cannot be adequately resolved on the written record. Pennsylvania PUC urges the Commission to adopt provisions that provide for a hearing that affords entities an opportunity to present their case in full using all due process protections afforded by a contested on-the-record proceeding. SoCal Edison states that when material disputes are raised, the Commission should have a full hearing before an ALJ with the appropriate protections. Western Governors raise similar concerns.

203. The Commission believes that in most instances, the Commission will make its ultimate determination on the basis of the paper record compiled in the proceeding. The Commission may order a trial-type hearing, however, either on its own motion or the motion of any interested party of record in accordance with subpart E of Part 385 of the regulations if the Commission deems it appropriate.

J. Permit Conditions

204. Section 50.11(b) requires that the permittee accept the permit in writing within 30 days from the date of the order issuing the permit. EEI contends that the deadline should be extended to allow the permittee to seek rehearing. It states that this is necessary because certain aspects of the permit order may render the proposed project uneconomic or otherwise infeasible. Therefore, it states that the applicant's rehearing request must be addressed before it can determine whether or not to accept the permit. Allegheny makes similar arguments. The Commission agrees that an applicant should be able to appeal the Commission's decision before it is required to accept its permit and has modified § 50.11(b) accordingly.

205. Los Angeles Department of Water and Power (Los Angeles DWP) contends that acceptance of a permit would require approval of its Board of Commissioners and that the approval may take more than 30 days. Los Angeles DWP proposes that the 30 day period be extended in response to a reasonable request by the applicant. The Commission may waive a rule for good cause shown. If a permittee needs an extension of time to accept its permit it may request a waiver of § 50.11(b).

206. Section 50.11(c) requires, among other things, that the facilities be constructed in a matter to prevent interference with service furnished by other public utilities. Imperial states that the construction, installation, operation, and maintenance of new

transmission facilities should be conducted in a manner that prevents interference with service not only furnished by public utilities, but also services furnished by non-public utilities. We will add non-public utilities to § 50.11(c).

207. Section 50.11(d) requires written authorization from the Director of OEP prior to commencing construction or initiating operations of the approved facilities. American Transmission states that the Commission's issuance of a permit should be sufficiently final so that applicants can begin the construction process, including making financial commitments. It contends that any further delay would be unnecessary. The Commission generally imposes a substantial number of conditions in its orders authorizing project construction, such as requests that the permittee receive all final comments from various resource agencies before commencing construction. Additionally, the permittee may not be able to conduct all of the required surveys until it is able to condemn the property with the eminent domain authority received with the issuance of the Commission's permit. Thus, the Commission requires that the permittee complete all conditions precedent before it will authorize the construction of the facilities.

208. Virginia Electric states that written authorization obtained from the Director of OEP should permit both commencing construction of the facilities and initiating operations. A single permit will allow for the timely construction and operations of

new transmission facilities. Generally, the Commission will not authorize the commencement of service on the new facilities until it determines that the rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily. Accordingly, the permittee needs authorization from the Director of OEP to make the facilities available for service.

209. Communities contend that in instances of delayed construction, there should be a provision for reopening the order granting the permit to allow for public scrutiny of the change of circumstances to ensure that the delay is in the public interest. Section 50.11(e) requires that the facilities be completed within the timeframe specified in the Commission order. If the facilities are constructed as required by the Commission, there will be no reason to revisit the Commission's decision. Section 50.11(e) also states that if the permittee does not complete the facilities within the specified timeframe it must file a request for an extension of time.

210. Under § 50.11(g) a permitee must notify affected landowners that have executed easement agreements to convey property rights for the proposed facilities if the permit is transferred. EEI states that the requirement that the permit holder notify all affected landowners if a permit is transferred could be unduly burdensome in many instances when the permittee no longer knows the identity of landowners along the right-of-way because the transmission line was authorized and landowners consulted many years

previously. The Commission is issuing a permit to construct the facilities. If a permit is transferred at any time before the facilities are constructed, the new permittee will be required to contact all landowners subject to easement agreements that a different company will be constructing the facilities and who they will need to contact while the facilities are being constructed.

211. Affiliated states that compliance with applicable tribal law should be included as condition to a permit. Section 50.11 details general conditions that will apply to all permits issued by the Commission. The Commission also will impose other conditions to address specific issues that will arise in a proceeding on a case-by-case basis.

212. American Transmission states that the Commission should include reporting requirements which could capture any changes since a permit is issued. National Grid states that there should be no ongoing reporting requirements regarding operations and maintenance. The Commission's jurisdiction under FPA section 216 is to issue permits to construct electric transmission facilities. Once the facilities are constructed and operational and all the Commission's right-of-way restoration conditions have been met, the Commission's jurisdiction over the facilities under FPA section 216 ends. Thus, there will be no changes to the permits or any ongoing reporting and maintenance requirements.

K. State and Local Permits

213. Under §§ 50.5(c)(2) and (3) the applicant is required to include a description of the zoning requirements for the facilities and a list of local entities with local authorization requirements, respectively. EEI states that the requirements that the applicant describe the zoning and site availability for any permanent facilities and to account for each of the local permitting requirements could potentially be misconstrued by localities to imply that a transmission project sponsor must obtain local permits. It contends that this is counter to the plain language of FPA section 216 that preempts State and local law, including zoning requirements. It requests that the Commission clarify that the Final Rule preempts State and local permitting requirements. American Transmission requests that the Commission clarify the need for zoning requirement information.

214. While the Commission may, where appropriate, require applicants comply with State and local permitting, we note, any State or local permits issued with respect to jurisdictional facilities must be consistent with the conditions of the Commission's permit. The Commission encourages cooperation between the applicants and local authorities. However, this does not mean that State and local agencies, through application of State or local laws, may prohibit or unreasonably delay the construction of facilities approved by the Commission.[38]

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[38]See, e.g., Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988); National Fuel Gas Supply v. Public Service Comm'n.

215. Communities state that while the Commission may assert jurisdiction over the siting of transmission facilities, it cannot ignore the role the States must still play in the siting process. They argue that the Commission is attempting to limit State authority to only State agencies that provide authorization under Federal law. They contend that this is inconsistent with the requirements of FPA section 216(h)(3) which requires that the NEPA review process be coordinated with State agencies conducting separate permitting and environmental reviews.

216. FPA section 216(h), which is entitled "Coordination of Federal Authorizations for Transmission Facilities", directs the Commission, under its delegated authority, to "coordinate the Federal authorization and review process under this subsection with . . . State agencies". Section 216(h)(3) specifically involves only Federal authorizations. Under FPA section 216(h)(4), however, the Commission can coordinate with "State agencies that are willing to coordinate their own separate permitting and environmental reviews with the Federal authorizations and environmental reviews."

217. As stated, under § 50.5(c)(3), in the initial pre-filing filing requirements the applicant is required to list all local entities with local authorization requirements. Section 50.5(c)(3) also requires that the applicant explain how it intends to account for the

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894 F.2d 571 (2d Cir. 1990).

local permits in the environmental review process and when it intends to file for such permits. Once the pre-filing process commences, under § 50.5(e)(6), the applicant is required to submit a schedule detailing when it intends to submit the applications with the local agency. Further, under § 50.5(e)(8), the applicant is required to submit status reports updating its progress in obtaining those permits.

218. Commission staff will work with the applicant and the local agencies throughout the pre-filing and application process to get the information required for all applicable Federal and State permit processes needed to site the proposed facilities. However, as discussed above, a State or local agency cannot prevent the construction of the facility through its permitting process, which is preempted by Federal law in instances where our jurisdiction is triggered under FPA section 216. For example, it would be inconsistent with the text, purpose and intent of FPA section 216 to allow a State permitting agency to halt the construction of a facility that has been permitted by the Commission for the very reason that the State agency withheld approval of the project for more than one year. To hold otherwise would essentially render FPA section 216 a nullity.

L. Subsequent Modifications to Facilities

219. Several commenters request clarification on how a permittee may make minor improvements to the facilities authorized by the Commission after they are constructed. EEI requests that the permit include

provisions that allow a permittee to make minor improvements after facilities are constructed. Allegheny states that the Commission should clarify the process for making modifications to existing facilities to specify that an applicant is not required to first seek State approval. Allegheny further requests that when such a modification is proposed, the Commission's review be limited to the proposed modifications, whether the existing facility was sited by the Commission or State siting authority. National Grid contends that a transmission siting permit is valid in perpetuity. It argues that otherwise, an applicant would have no incentive for investment. It also requests that the Commission develop criteria to determine whether project modification requires notice to the Commission or a revision to the permit.

220. As stated, once the facilities are constructed, the Commission's jurisdiction under FPA section 216 ends. All modifications to existing transmission facilities will be subject to the provisions of FPA section 216 at the time the facilities are proposed. Specifically, the facilities will have to be located in a then-designated National Corridor and will have to qualify for the Commission's jurisdiction under FPA section 216(b)(1).

M. Definitions

221. Section 50.1 lists the terms the Commission determined needed to be specifically defined in the regulations. Allegheny requests that the Commission define the terms "project" and "transmission facility" to clarify that they only pertain to the portions of

transmission facilities that a transmission owner is unable to successfully site through a State process. Southern contends that the Commission should consider defining "project" to embody the triggering requirements in FPA section 216(b). The only projects that the Commission will be issuing permits to are those that will fall under FPA section 216(b). Thus, no further explanation of those terms is necessary.

222. National Grid requests that the Commission define "Electric transmission facilities" to include those facilities, including various listed equipment and materials, used for the transmission of electric energy in interstate commerce for the sale of electric energy at wholesale. Transmission facilities that will be subject to a Commission permit will include all the facilities necessary to provide service on the facilities approved by the Commission. Further definition of facilities in the regulations is unnecessary.

223. Section 50.1 defines transmitting utility as an entity that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce for the sale of electric energy at wholesale. Massachusetts Energy Board states that the Commission should consider defining the terms "transmission" and "wholesale" in the definition of transmitting utility or reference the existing CFR definitions. Section 50.1 defines a transmitting utility consistent with the definition in FPA section 3(23). The Commission does not believe any further definition is necessary.

224. Southern requests that the Commission define the term "applicant" and clarify that the permitting process will only be available to transmission utilities, unless exceptional circumstances are shown. The Commission does not believe that it was Congress' intent in enacting EPAct 2005 to limit the construction of electric transmission facilities in national interest transmission corridors to any specific entity. The Commission will accept any viable project proposed by any prospective transmission company.

N. Eminent Domain Issues

225. Under § 50.4(c)(2)(i)(E), the applicant must include a brief summary of what rights the affected landowner has at the Commission and in proceedings under the eminent domain rules of the relevant State. Reinhardts request that the pre-filing notifications include a statement that the applicant will have the ability to use the power of eminent domain to get the land for the facility and the basis for that authority. Southern states that the Commission should not require an applicant to summarize the State eminent domain rules because the applicant would be legally liable for the accuracy of this information.

226. The Commission believes that the applicant should provide landowners with some basic information concerning what is involved in the eminent domain process. The general public is probably not greatly informed on these matters and may need to invest significant time and money just to get a basic understanding. We do not believe that

providing this information would put the applicant at risk for unnecessary litigation, especially if the applicant prefaces its explanation with a disclaimer statement. It can also refer the landowner to a State agency or the State Attorney General for further information concerning the laws of their State, if appropriate. Additionally, we will require that the applicant explain that it has the right to acquire the property by eminent domain under FPA section 216(e).

227. Communities suggest that if State law limits eminent domain authority, the Federal court likewise is constrained. Southern states that the Commission should make clear how, and to what extent, the United States District Courts are to employ State practices and procedures as part of an eminent domain proceeding commenced in a Federal forum. Section 216(e)(3) of the FPA states:

> The practice and procedures of any action or proceeding conducted under this subsection in the district court of the United States shall conform as nearly as practicable to the practice and procedures in a similar action or proceeding in the courts of the State in which the property is located.

Thus, it is for the court to decide what procedures are appropriate for their individual proceedings.

O. Filing Fees/Funding

228. Affiliated states that if Tribes are impacted by any project, a filing fee should be required by the Commission to fund reasonable tribal responses and requirements under these regulations. Washington Council contends that the Commission should require the applicants fund reasonable State participation in FERC siting proceedings. Parks Association request that the applicant fund third-party contractors for the research that other agencies will need to do for the resource reports. The Commission does not require that applicants fund any participation in Commission proceedings and will not do so here.

P. Technical Conferences

229. APPA, NARUC, and CA Resources request that the Commission hold a technical conference prior to issuing the Final Rule to discuss various issues raised in the NOPR. Specifically, APPA requests that the Commission hold a technical conference to help define diverse State and Federal processes and the regulator's legal authorities. NARUC contends that the Commission should hold a technical conference to give the State commissions an opportunity to address key matters related to the implementation of this rule. CA Resources Agency requests that the Commission hold a technical conference or establish an informal workshop to develop solutions to the issue of the concurrent jurisdiction and with regard to potential changes to the Commission's CEII regulations.

230. The Commission believes that the comments filed in response to the NOPR are sufficient for the

Commission to issue a Final Rule without further proceedings. By acting promptly, the Commission is assured that it will have its procedures required under FPA section 216(c) in place when DOE designates National Corridors.

III. Information Collection Statement

231. The Commission is submitting the following collection of information contained in this proposed rulemaking to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995.[39] The Commission will identify the information provided for under the proposed Part 50 as FERC-729.

232. The number of applicants for electric transmission permits in national interest electric transmission corridors is unknown. Proposed transmission projects would have to, among other things, significantly reduce electric transmission congestion in a national interest electric transmission corridor. These corridors are yet to be defined by the Secretary. Also, Federal permitting of electric transmission facilities used in interstate commerce will occur only if, or when, States do not or cannot act on an application, or have conditioned a project in such a manner that the proposed construction or modification will not significantly reduce congestion in interstate commerce or is not economically feasible. Any estimates of the number of anticipated electric

[39] 44 U.S.C. 3507(d).

transmission construction permit applications are extremely variable, ranging from two to 20 per year.

233. The Commission solicited comments on the Commission's need for the information required by the proposed regulations, whether the information will have practical utility, the accuracy of the provided burden estimates, ways to enhance the quality and clarity of the information that the Commission will collect, and any suggested methods for minimizing the respondent's burden, including the use of information techniques. The burden estimates for complying with this proposed rule are as follows:

Data Collection	Number of Respondents	Number of Responses	Hours Per Response	Total Annual Hours
FERC-729	10	1	9,600	96,000

The Commission did not receive any specific comments concerning its burden estimates. Where commenters raised concerning specific information collection requirement would be burdensome to implement, the Commission has addressed elsewhere in the rule.

Information Collection Costs: Because of the regional differences and the various staffing levels that will be involved in preparing the documentation (legal, technical and support) the Commission is using an hourly rate of $150 to estimate the costs for filing and other administrative processes (reviewing instructions, searching data sources, completing and transmitting the collection of information). The estimated annual

cost is anticipated to be $14.4 million. The Commission sought comments on these estimates and did not receive any. Therefore, it will use these estimates in the Final Rule.

Title: FERC-729 Electric Transmission Facilities

Action: Proposed Data Collections

OMB Control No. To be determined.

Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number or the Commission has provided justification as to why the control number should not be displayed.

Respondents: Businesses or other for profit, State, local, or Tribal government.

Necessity of the Information: The information collected from applicants will be used by the Commission to review the suitability of the proposal for a permit to construct the proposed electric transmission facilities.

234. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426

[Attention: Michael Miller, Office of the Executive Director, Phone: (202)502-8415, fax: (202)273-0873, e-mail: michael.miller@ferc.gov]

235. For submitting comments concerning the collection(s) of information and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503, [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202)395-4650, fax: (202)395-7285, e-mail: oira_submission@omb.eop.gov. As the OMB control number has not been assigned to this information collection, please use the docket number for reference in your comments.

IV. Environmental Analysis

236. The Commission is required to prepare an EA or an EIS for any action that may have a significant adverse effect on the human environment.[40] No environmental consideration is raised by the promulgation of a rule that is procedural in nature or does not substantially change the effect of legislation or regulations being amended. The proposed regulations implement the procedural filing requirements for applications to construct electric transmission facilities. Accordingly, neither an EIS

[40]Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

nor EA is required.

V. Regulatory Flexibility Act

237. The Regulatory Flexibility Act of 1980 (RFA)[41] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission expects entities seeking approval for interstate transmission siting will be major transmission utilities capable of financing complex and costly transmission projects. The Commission anticipates that the high cost of construction of transmission facilities will bar the entry into this field by small entities as defined by the RFA. Therefore, the Commission concludes that this proposed rule would not have a significant economic impact on a substantial number of small entities.

VI. Document Availability

238. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (http://www.ferc.gov) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

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[41] 5 USC 601-612.

239. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

240. User assistance is available for eLibrary and the FERC's website during normal business hours from our Help line at (202)502-8222 or the Public Reference Room at (202) 502-8371 Press 0, TTY (202)502-8659. E-Mail the Public Reference Room at public.referenceroom@ferc.gov.

VII. Effective Date and Congressional Notification

241. These regulations are effective [insert date 60 days from the date the rule is published in the FEDERAL REGISTER]. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996. The Commission will submit the Final Rule to both houses of Congress and to General Accounting Office

List of subjects

18 CFR Part 50

Administrative practice and procedure, Electric power,

Reporting and recordkeeping requirements.

18 CFR Part 380

Environmental impact statements, Reporting and recordkeeping requirements.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission adds Part 50 and amends Part 380, Chapter I, Title 18, Code of Federal Regulations, as follows:

1. Part 50, Subchapter B, is added to read as follows:

PART 50 - - APPLICATIONS FOR PERMITS TO SITE INTERSTATE ELECTRIC TRANSMISSION FACILITIES

Sec.

50.1 Definitions.

50.2 Purpose and intent of rules.

50.3 Applications/pre-filing; rules and format.

50.4 Stakeholder Participation.

50.5 Pre-filing procedures.

50.6 Applications: general content.

50.7 Applications: exhibits.

50.8 Acceptance/rejection of applications.

50.9 Notice of application.

50.10 Interventions.

50.11 General conditions applicable to permits.

Authority: 16 U.S.C. 824p, DOE Delegation Order No. 00-004.00A.

§ 50.1 Definitions.

As used in this part:

Affected landowners include owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, whose property:

(1) Is directly affected (i.e., crossed or used) by the proposed activity, including all facility sites, rights-of-way, access roads, staging areas, and temporary workspace; or

(2) Abuts either side of an existing right-of-way or facility site owned in fee by any utility company, or abuts the edge of a proposed facility site or right-of-way which runs along a property line in the area in which the facilities would be constructed, or contains a residence within 50 feet of a proposed construction work area.

Director means the Director of the Office of Energy Projects or his designees.

Federal authorization means permits, special use authorization, certifications, opinions, or other approvals that may be required under Federal law in order to site a transmission facility.

National interest electric transmission corridor means any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers, as designated by the

Secretary of Energy.

Permitting entity means any Federal or State agency, Indian tribe, multistate, or local agency that is responsible for issuing separate authorizations pursuant to Federal law that are required to construct electric transmission facilities in a national interest electric transmission corridor.

Stakeholder means any Federal, State, interstate, Tribal, or local agency, any affected non-governmental organization, affected landowner, or interested person.

Transmitting utility means an entity that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce for the sale of electric energy at wholesale.

§ 50.2 Purpose and intent of rules.

(a) The purpose of the regulations in this part is to provide for efficient and timely review of requests for permits for the siting of electric transmission facilities under section 216 of the Federal Power Act. The regulations ensure that each stakeholder is afforded an opportunity to present views and recommendations with respect to the need for and impact of a facility covered by the permit. They also coordinate, to the maximum extent practicable, the Federal authorization and review processes of other Federal and State agencies, Indian tribes, multistate, and local entities that are

responsible for conducting any separate permitting and environmental reviews of the proposed facilities.

(b) Every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project.

(c) Every requirement of this part will be considered as an obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.

(d) The burden of assuring that all applications and information submitted under this part is in an intelligible form and any omission of data is justified rests with the applicant.

§ 50.3 Applications/pre-filing; rules and format.

(a) Filings are subject to the formal paper and electronic filing requirements for proceedings before the Commission as provided in part 385 of this chapter.

(b) Applications, amendments, and all exhibits and other submissions required to be furnished by an applicant to the Commission under this part must be submitted in an original and 7 conformed copies.

(c) When an application considered alone is

incomplete and depends vitally upon information in another application, it will not be accepted for filing until the supporting application has been filed. When applications are interdependent, they must be filed concurrently.

(d) All filings must be signed in compliance with § 385.2005 of this chapter.

(e) The Commission will conduct a paper hearing on applications for permits for electric transmission facilities.

(f) Permitting entities will be subject to the filing requirements of this section and the prompt and binding intermediate milestones and ultimate deadlines established in the notice issued under § 50.9.

(g) Any person submitting documents containing critical energy infrastructure information must follow the procedures specified in § 388.113 of this chapter.

§ 50.4 Stakeholder participation.

A Project Participation Plan is required to ensure stakeholders have access to accurate and timely information on the proposed project and permit application process.

(a) Project Participation Plan. An applicant must develop a Project Participation Plan and file it with the pre-filing materials under § 50.5(c)(7) that:

(1) Identifies specific tools and actions to facilitate stakeholder communications and public information, including an up-to-date project website and a readily accessible, single point of contact within the company;

(2) Lists all central locations in each county throughout the project area where the applicant will provide copies of all their filings related to the proposed project; and

(3) Includes a description and schedule explaining how the applicant intends to respond to requests for information from the public as well as Federal, State, and Tribal permitting agencies, and other legal entities with local authorization requirements.

(b) Document Availability.

(1) Within three business days of the date the pre-filing materials are filed or application is issued a docket number, an applicant must ensure that:

(i) Complete copies of the pre-filing or application materials are available in accessible central locations in each county throughout the project area, either in paper or electronic format; and

(ii) Complete copies of all filed materials are available on the project website.

(2) An applicant is not required to serve voluminous or difficult to reproduce material, such as copies of certain environmental information, on all parties, as long as such material is publicly available in an accessible central location in each county throughout the project area and on the applicant's project website.

(c) Project notification.

(1) The applicant must make a good faith effort to notify: all affected landowners; landowners with a residence within a quarter mile from the edge of the construction right-of-way of the proposed project; towns and communities; permitting agencies; other local, State, Tribal, and Federal governments and agencies involved in the project; electric utilities and transmission owners and operators that are or may be connected to the application's proposed transmission facilities; and any known individuals that have expressed an interest in the State permitting proceeding. Notification must be made:

(i) By certified or first class mail, sent:

(A) Within 14 days after the Director notifies the applicant of the commencement of the pre-filing process under § 50.5(d);

(B) Within 3 business days after the Commission notices the application under § 50.9; and

(ii) By twice publishing a notice of the pre-filing request and application filings, in a daily, weekly, and/or tribal newspaper of general circulation in each county in which the project is located, no later than 14 days after the date that a docket number is assigned for the pre-filing process or to the application.

(2) Contents of participation notice

(i) The pre-filing request notification must, at a minimum, include:

(A) The docket number assigned to the proceeding;

(B) The most recent edition of the Commission's pamphlet Electric Transmission Facilities Permit Process. The newspaper notice need only refer to the pamphlet and indicate that it is available on the Commission's website;

(C) A description of the applicant and a description of the proposed project, its location (including a general location map), its purpose, and the timing of the project;

(D) A general description of the property the applicant will need from an affected landowner if the project is approved, how to contact the applicant, including a local or toll-free phone number, the name of a specific person to contact who is knowledgeable about the project, and a reference to the project website. The newspaper notice need not include a

description of the property, but should indicate that a separate notice is being mailed to affected landowners and governmental entities;

(E) A brief summary of what rights the affected landowner has at the Commission and in proceedings under the eminent domain rules of the relevant State. The newspaper notice does not need to include this summary;

(F) Information on how to get a copy of the pre-filing information from the company and the location(s) where copies of the pre-filing information may be found as specified in paragraph (b) of this section;

(G) A copy of the Director's notification of commencement of the pre-filing process, the Commission's Internet address, and the telephone number for the Commission's Office of External Affairs; and

(H) Information explaining the pre-filing and application process and when and how to intervene in the application proceedings.

(ii) The application notification must include the Commission's notice issued under § 50.9.

(3) If, for any reason, a stakeholder has not yet been identified when the notices under this paragraph are sent or published, the applicant must supply the information required under paragraphs

(c)(2)(i) and (ii) of this section when the stakeholder is identified.

(4) If the notification is returned as undeliverable, the applicant must make a reasonable attempt to find the correct address and notify the stakeholder.

(5) Access to critical energy infrastructure information is subject to the requirements of § 388.113 of this chapter.

§ 50.5 Pre-filing procedures.

(a) Introduction. Any applicant seeking a permit to site new electric transmission facilities or modify existing facilities must comply with the following pre-filing procedures prior to filing an application for Commission review.

(b) Initial consultation. An applicant must meet and consult with the Director concerning the proposed project.

(1) At the initial consultation meeting, the applicant must be prepared to discuss the nature of the project, the contents of the pre-filing request, and the status of the applicant's progress toward obtaining the information required for the pre-filing request described in paragraph (c) of this section.

(2) The initial consultation meeting will also include a discussion of whether a third-party

contractor is likely to be needed to prepare the environmental documentation for the project and the specifications for the applicant's solicitation for prospective third-party contractors.

(3) The applicant also must discuss how its proposed project will be subject to the Commission's jurisdiction under section 216(b)(1) of the Federal Power Act. If the application is seeking Commission jurisdiction under section 216(b)(1)(C) of the Federal Power Act, the applicant must be prepared to discuss when it filed its application with the State and the status of that application.

(c) Contents of the initial filing. An applicant's pre-filing request will be filed after the initial consultation and must include the following information:

(1) A description of the schedule desired for the project, including the expected application filing date, desired date for Commission approval, and proposed project operation date, as well as the status of any State siting proceedings.

(2) A detailed description of the project, including location maps and plot plans to scale showing all major components, including a description of zoning and site availability for any permanent facilities.

(3) A list of the permitting entities responsible for conducting separate Federal permitting

and environmental reviews and authorizations for the project, including contact names and telephone numbers, and a list of local entities with local authorization requirements. The filing must include information concerning:

(i) How the applicant intends to account for each of the relevant entity's permitting and environmental review schedules, including its progress in DOE's pre-application process; and

(ii) When the applicant proposes to file with these permitting and local entities for the respective permits or other authorizations.

(4) A list of all affected landowners and other stakeholders (include contact names and telephone numbers) that have been contacted, or have contacted the applicant, about the project.

(5) A description of what other work already has been done, including, contacting stakeholders, agency and Indian tribe consultations, project engineering, route planning, environmental and engineering contractor engagement, environmental surveys/studies, open houses, and any work done or actions taken in conjunction with a State proceeding. This description also must include the identification of the environmental and engineering firms and sub-contractors under contract to develop the project.

(6) Proposals for at least three prospective third-party contractors from which Commission staff

may make a selection to assist in the preparation of the requisite NEPA document, if the Director determined a third-party contractor would be necessary in the Initial Consultation meeting.

(7) A proposed Project Participation Plan, as set forth in § 50.4(a).

(d) Director's notice.

(1) When the Director finds that an applicant seeking authority to site and construct an electric transmission facility has adequately addressed the requirements of paragraphs (a), (b), and (c) of this section, and any other requirements determined at the Initial Consultation meeting, the Director will so notify the applicant.

(i) The notification will designate the third-party contractor, and

(ii) The pre-filing process will be deemed to have commenced on the date of the Director's notification.

(2) If the Director determines that the contents of the initial pre-filing request are insufficient, the applicant will be notified and given a reasonable time to correct the deficiencies.

(e) Subsequent filing requirements. Upon the Director's issuance of a notice commencing an applicant's pre-filing process, the applicant must:

(1) Within 7 days, finalize and file the Project Participation Plan, as defined in § 50.4(a), and establish the dates and locations at which the applicant will conduct meetings with stakeholders and Commission staff.

(2) Within 14 days, finalize the contract with the selected third-party contractor, if applicable.

(3) Within 14 days:

(i) Provide all identified stakeholders with a copy of the Director's notification commencing the pre-filing process;

(ii) Notify affected landowners in compliance with the requirements of § 50.4(c); and

(iii) Notify permitting entities and request information detailing any specific information not required by the Commission in the resource reports required under § 380.16 of this chapter that the permitting entities may require to reach a decision concerning the proposed project. The responses of the permitting entities must be filed with the Commission, as well as being provided to the applicant.

(4) Within 30 days, submit a mailing list of all stakeholders contacted under paragraph (e)(3) of this section, including the names of the Federal, State, Tribal, and local jurisdictions' representatives. The list must include information concerning affected

landowner notifications that were returned as undeliverable.

(5) Within 30 days, file a summary of the project alternatives considered or under consideration.

(6) Within 30 days, file an updated list of all Federal, State, Tribal, and local agencies permits and authorizations that are necessary to construct the proposed facilities. The list must include:

(i) A schedule detailing when the applications for the permits and authorizations will be submitted (or were submitted);

(ii) Copies of all filed applications; and

(iii) The status of all pending permit or authorization requests and of the Secretary of Energy's pre-application process being conducted under section 216(h)(4)(C) of the Federal Power Act.

(7) Within 60 days, file the draft resource reports required in § 380.16 of this chapter.

(8) On a monthly basis, file status reports detailing the applicant's project activities including surveys, stakeholder communications, and agency and tribe meetings, including updates on the status of other required permits or authorizations. If the applicant fails to respond to any request for additional information, fails to provide sufficient information, or is not making sufficient progress towards completing

the pre-filing process, the Director may issue a notice terminating the process.

(f) Concluding the pre-filing process. The Director will determine when the information gathered during the pre-filing process is complete, after which the applicant may file an application. An application must contain all the information specified by the Commission staff during the pre-filing process, including the environmental material required in part 380 of this chapter and the exhibits required in § 50.7.

§ 50.6 Applications: general content.

Each application filed under this part must provide the following information:

(a) The exact legal name of applicant; its principal place of business; whether the applicant is an individual, partnership, corporation, or otherwise; the State laws under which the applicant is organized or authorized; and the name, title, and mailing address of the person or persons to whom communications concerning the application are to be addressed.

(b) A concise description of applicant's existing operations.

(c) A concise general description of the proposed project sufficient to explain its scope and purpose. The description must, at a minimum: describe the proposed geographic location of the principal project features and the planned routing of

the transmission line; contain the general characteristics of the transmission line including voltage, types of towers, origin and termination points of the transmission line, and the geographic character of area traversed by the line; and be accompanied by an overview map of sufficient scale to show the entire transmission route on one or a few 8.5 by 11-inch sheets.

(d) Verification that the proposed route lies within a national interest electric transmission corridor designated by the Secretary of the Department of Energy under section 216 of the Federal Power Act.

(e) Evidence that:

(1) A State in which the transmission facilities are to be constructed or modified does not have the authority to approve the siting of the facilities or consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

(2) The applicant is a transmitting utility but does not qualify to apply for a permit or siting approval of the proposed project in a State because the applicant does not serve end-use customers in the State; or

(3) A State commission or other entity that has the authority to approve the siting of the facilities has:

(i) Withheld approval for more than one year after the filing of an application seeking approval under applicable law or one year after the designation of the relevant national interest electric transmission corridor, whichever is later; or

(ii) Conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.

(f) A demonstration that the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce, and that the proposed construction or modification:

(1) Is consistent with the public interest;

(2) Will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;

(3) Is consistent with sound national energy policy and will enhance energy interdependence; and

(4) Will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.

(g) A description of the proposed construction and operation of the facilities, including the proposed dates for the beginning and completion of construction and the commencement of service.

(h) A general description of project financing.

(i) A full statement as to whether any other application to supplement or effectuate the applicant's proposals must be or is to be filed by the applicant, any of the applicant's customers, or any other person, with any other Federal, State, Tribal, or other regulatory body; and if so, the nature and status of each such application.

(j) A table of contents that must list all exhibits and documents filed in compliance with this part, as well as all other documents and exhibits otherwise filed, identifying them by their appropriate titles and alphabetical letter designations. The alphabetical letter designations specified in § 50.7 must be strictly adhered to and extra exhibits submitted at the volition of applicant must be designated in sequence under the letter Z (Z1, Z2, Z3, etc.).

(k) A form of notice suitable for publication in the Federal Register, as provided by § 50.9(a), which will briefly summarize the facts contained in the application in such a way as to acquaint the public with its scope and purpose. The form of notice also must include the name, address, and telephone number of an authorized contact person.

§ 50.7 Applications: exhibits.

Each exhibit must contain a title page showing

the applicant's name, title of the exhibit, the proper letter designation of the exhibit, and, if 10 or more pages, a table of contents, citing by page, section number or subdivision, the component elements or matters contained in the exhibit.

(a) Exhibit A - Articles of incorporation and bylaws. If the applicant is not an individual, a conformed copy of its articles of incorporation and bylaws, or other similar documents.

(b) Exhibit B - State authorization. For each State where the applicant is authorized to do business, a statement showing the date of authorization, the scope of the business the applicant is authorized to carry on and all limitations, if any, including expiration dates and renewal obligations. A conformed copy of applicant's authorization to do business in each State affected must be supplied upon request.

(c) Exhibit C - Company officials. A list of the names and business addresses of the applicant's officers and directors, or similar officials if the applicant is not a corporation.

(d) Exhibit D - Other pending applications and filings. A list of other applications and filings submitted by the applicant that are pending before the Commission at the time of the filing of an application and that directly and significantly affect the proposed project, including an explanation of any material effect the grant or denial of those other applications and filings will have on the application and of any material

effect the grant or denial of the application will have on those other applications and filings.

(e) Exhibit E - Maps of general location of facilities. The general location map required under § 50.5(c) must be provided as Exhibit E. Detailed maps required by other exhibits must be filed in those exhibits, in a format determined during the pre-filing process § 50.5.

(f) Exhibit F - Environmental report. An environmental report as specified in §§ 380.3 and 380.16 of this chapter. The applicant must submit all appropriate revisions to Exhibit F whenever route or site changes are filed. These revisions must identify the locations by mile post and describe all other specific differences resulting from the route or site changes, and should not simply provide revised totals for the resources affected.

The format of the environmental report filing will be determined during the pre-filing process required under § 50.5.

(g) Exhibit G – Engineering data.

(1) A detailed project description including:

(i) Name and destination of the project;

(ii) Design voltage rating (kV);

(iii) Operating voltage rating (kV);

(iv) Normal peak operating current rating;

(v) Line design features for minimizing television and/or radio interference cause by operation of the proposed facilities; and

(vi) Line design features that minimize audible noise during fog/rain caused by operation of the proposed facilities, including comparing expected audible noise levels to the applicable Federal, State, and local requirements.

(2) A conductor, structures, and substations description including:

(i) Conductor size and type;

(ii) Type of structures;

(iii) Height of typical structures;

(iv) An explanation why these structures were selected;

(v) Dimensional drawings of the typical structures to be used in the project; and

(vi) A list of the names of all new (and existing if applicable) substations or switching stations that will be associated with the proposed new transmission line.

(3) The location of the site and right-of-way

including:

(i) Miles of right-of-way;

(ii) Miles of circuit;

(iii) Width of the right-of-way;

(iv) A brief description of the area traversed by the proposed transmission line, including a description of the general land uses in the area and the type of terrain crossed by the proposed line;

(4) Assumptions, bases, formulae, and methods used in the development and preparation of the diagrams and accompanying data, and a technical description providing the following information:

(i) Number of circuits, with identification as to whether the circuit is overhead or underground;

(ii) The operating voltage and frequency; and

(iii) Conductor size, type and number of conductors per phase.

(5) If the proposed interconnection is an overhead line, the following additional information also must be provided:

(i) The wind and ice loading design parameters;

(ii) A full description and drawing of a typical supporting structure including strength specifications;

(iii) Structure spacing with typical ruling and maximum spans;

(iv) Conductor (phase) spacing; and

(v) The designed line-to-ground and conductor-side clearances.

(6) If an underground or underwater interconnection is proposed, the following additional information also must be provided:

(i) Burial depth;

(ii) Type of cable and a description of any required supporting equipment, such as insulation medium pressurizing or forced cooling;

(iii) Cathodic protection scheme; and

(iv) Type of dielectric fluid and safeguards used to limit potential spills in waterways.

(7) Technical diagrams that provide clarification of any of the above items should be included.

(8) Any other data or information not previously identified that has been identified as a minimum requirement for the siting of a transmission

line in the State in which the facility will be located.

(h) Exhibit H - System analysis data. An analysis evaluating the impact the proposed facilities will have on the existing electric transmission system performance, including:

(1) An analysis of the existing and expected congestion on the electric transmission system.

(2) Power flow cases used to analyze the proposed and future transmission system under anticipated load growth, operating conditions, variations in power import and export levels, and additional transmission facilities required for system reliability. The cases must:

(i) Provide all files to model normal, single contingency, multiple contingency, and special protective systems, including the special protective systems' automatic switching or load shedding system; and

(ii) State the assumptions, criteria, and guidelines upon which they are based and take into consideration transmission facility loading; first contingency incremental transfer capability (FCITC); normal incremental transfer capability (NITC); system protection; and system stability.

(3) A stability analysis including study assumptions, criteria, and guidelines used in the analysis, including load shedding allowables.

(4) A short circuit analysis for all power flow cases.

(5) A concise analysis to include:

(i) An explanation of how the proposed project will improve system reliability over the long and short term;

(ii) An analysis of how the proposed project will impact long term regional transmission expansion plans;

(iii) An analysis of how the proposed project will impact congestion on the applicant's entire system; and

(iv) A description of proposed high technology design features.

(6) Detailed single-line diagrams, including existing system facilities identified by name and circuit number, that show system transmission elements, in relation to the project and other principal interconnected system elements, as well as power flow and loss data that represent system operating conditions.

(i) Exhibit I - Project Cost and Financing.

(1) A statement of estimated costs of any new construction or modification.

(2) The estimated capital cost and estimated annual operations and maintenance expense of each proposed environmental measure.

(3) A statement and evaluation of the consequences of denial of the transmission line permit application.

(j) Exhibit J -Construction, operation, and management. A concise statement providing arrangements for supervision, management, engineering, accounting, legal, or other similar service to be rendered in connection with the construction or operation of the project, if not to be performed by employees of the applicant, including reference to any existing or contemplated agreements, together with a statement showing any affiliation between the applicant and any parties to the agreements or arrangements.

§ 50.8 Acceptance/rejection of applications.

(a) Applications will be docketed when received and the applicant so advised.

(b) If an application patently fails to comply with applicable statutory requirements or with applicable Commission rules, regulations, and orders for which a waiver has not been granted, the Director may reject the application as provided by § 385.2001(b) of this chapter. This rejection is without prejudice to an applicant's refiling a complete application. However, an application will not be rejected solely on

the basis that the environmental reports are incomplete because the company has not been granted access by affected landowners to perform required surveys.

(c) An application that relates to a proposed project or modification for which a prior application has been filed and rejected, will be docketed as a new application.

§ 50.9 Notice of application.

(a) Notice of each application filed, except when rejected in accordance with § 50.8, will be issued and subsequently published in the Federal Register.

(b) The notice will establish prompt and binding intermediate milestones and ultimate deadlines for the coordination, and review of, and action on Federal authorization decisions relating to, the proposed facilities.

§ 50.10 Interventions.

Notices of applications, as provided by § 50.9, will fix the time within which any person desiring to participate in the proceeding may file a petition to intervene, and within which any interested regulatory agency, as provided by § 385.214 of this chapter, desiring to intervene may file its notice of intervention.

§ 50.11 General conditions applicable to permits.

(a) The following terms and conditions, among others as the Commission will find are required by the public interest, will attach to the issuance of each permit and to the exercise of the rights granted under the permit.

(b) The permit will be void and without force or effect unless accepted in writing by the permitee within 30 days from the date of the order issuing the permit. Provided that, when an applicant files for rehearing of the order in accordance with FPA section 313(a), the acceptance must be filed within 30 days from the issue date of the order of the Commission upon the application for rehearing or within 30 days from the date on which the application may be deemed to have been denied when the Commission has not acted on such application within 30 days after it has been filed. Provided further, that when a petition for review is filed in accordance with the provisions of FPA section 313(b), the acceptance shall be filed within 30 days after final disposition of the judicial review proceedings thus initiated.

(c) Standards of construction and operation. In determining standard practice, the Commission will be guided by the provisions of the American National Standards Institute, Incorporated, the National Electrical Safety Code, and any other codes and standards that are generally accepted by the industry, except as modified by this Commission or by municipal regulators within their jurisdiction. Each electric utility will construct, install, operate, and maintain its

plant, structures, equipment, and lines in accordance with these standards, and in a manner to best accommodate the public, and to prevent interference with service furnished by other public or non-public utilities insofar as practical.

(d) Written authorization must be obtained from the Director prior to commencing construction of the facilities or initiating operations. Requests for these authorizations must demonstrate compliance with all terms and conditions of the construction permit.

(e) Any authorized construction or modification must be completed and made available for service by the permitee within a period of time to be specified by the Commission in each order issuing the transmission line construction permit. If facilities are not completed within the specified timeframe, the permittee must file for an extension of time under § 385.2008 of this chapter.

(f) A permittee must file with the Commission, in writing and under oath, an original and four conformed copies, as provided in § 385.2011 of this chapter, of the following:

(1) Within ten days after the bona fide beginning of construction, notice of the date of the beginning; and

(2) Within ten days after authorized facilities have been constructed and placed in service, notice of

the date of the completion of construction and commencement of service.

(g) The permit issued to the applicant may be transferred, subject to the approval of the Commission, to a person who agrees to comply with the terms, limitations or conditions contained in the filing and in every subsequent Order issued thereunder. A permit holder seeking to transfer a permit must file with the Secretary a petition for approval of the transfer. The petition must:

(1) State the reasons supporting the transfer;

(2) Show that the transferee is qualified to carry out the provisions of the permit and any Orders issued under the permit;

(3) Be verified by all parties to the proposed transfer;

(4) Be accompanied by a copy of the proposed transfer agreement;

(5) Be accompanied by an affidavit of service of a copy on the parties to the permit proceeding; and

(6) Be accompanied by an affidavit of publication of a notice concerning the petition and service of such notice on all affected landowners that have executed agreements to convey property rights to the transferee and all other persons, municipalities or agencies entitled by law to be given notice of, or be

served with a copy of, any application to construct a major electric generation facility.

PART 380 – REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

2. The authority citation for part 380 continues to read as follows:

Authority: 42 U.S.C. 4321-4370a, 7101-7352; E.O. 12009, 3 CFR 1978 Comp., p. 142.

3. Section 380.3 is amended by revising paragraphs (a) introductory text and (b) introductory text, and by adding a new paragraph (c)(3) to read as follows:

§ 380.3 Environmental information to be supplied by an applicant.

(a) An applicant must submit information as follows:

* * * * *

(b) An applicant must also:

* * * * *

(c)

* * * * *

(3) Electric transmission project. For pre-filing requests and applications filed under section 216 of the Federal Power Act identified in §§ 380.5(b)(14) and 380.6(a)(5).

4. Section 380.5 is amended by revising paragraphs (b) (11), (b)(12), and (b)(13), and by adding a new paragraph (b)(14) to read as follows:

§ 380.5 Actions that require an environmental assessment.

(b)

* * * * *

(11) Approval of electric interconnections and wheeling under section 202(b), 210, 211, and 212 of the Federal Power Act, unless excluded under § 380.4(a)(17);

(12) Regulations or proposals for legislation not included under § 380.4(a)(2);

(13) Surrender of water power licenses and exemptions where project works exist or ground disturbing activity has occurred and amendments to water power licenses and exemptions that require ground disturbing activity or changes to project works or operations; and

(14) Except as identified in § 380.6, authorization to site new electric transmission

facilities under section 216 of the Federal Power Act and DOE Delegation Order No. 00-004.00A.

5. Section 380.6 is amended by revising paragraphs (a)(3) and (a)(4) and by adding a new paragraph (a)(5) to read as follows:

§ 380.6 Actions that require an environmental impact statement.

(a)

* * * * *

(3) Major pipeline construction projects under section 7 of the Natural Gas Act using right-of-way in which there is no existing natural gas pipeline;

(4) Licenses under Part I of the Federal Power Act and part 4 of this chapter for construction of any unconstructed water power projects; and

(5) Major electric transmission facilities under section 216 of the Federal Power Act and DOE Delegation Order No. 00-004.00A using right-of-way in which there is no existing facility.

* * * * *

6. Section 380.8 is revised to read as follows:

§ 380.8 Preparation of environmental documents.

The preparation of environmental documents, as defined in § 1508.10 of the regulations of the Council, on hydroelectric projects, natural gas facilities, and electric transmission facilities in national interest electric transmission corridors is the responsibility of the Commission's Office of Energy Projects, 888 First Street NE, Washington, DC 20426, (202) 219-8700. Persons interested in status reports or information on environmental impact statements or other elements of the NEPA process, including the studies or other information the Commission may require on these projects, can contact this office.

7. Section 380.10 is amended by adding paragraph (a)(2)(iii) to read as follows:

§ 380.10 Participation in Commission proceeding.

(a)

* * * * *

(2)

* * * * *

(iii) Commission pre-filing activities commenced under §§157.21 and 50.5 of this chapter, respectively, are not considered proceedings under part 385 of this chapter and are not open to motions to intervene. Once an application is filed under part 157 subpart A or part 50 of this chapter, any person may file a motion to intervene in accordance with §§ 157.10 or 50.10 of this chapter or in accordance with this

section.

* * * * *

8. Section 380.15 is amended by revising paragraph (c), the heading in paragraph (d), and paragraph (f)(5) to read as follows:

§ 380.15 Siting and maintenance requirements.

* * * * *

(c) Safety regulations. The requirements of this paragraph do not affect a project sponsor's obligations to comply with safety regulations of the U.S. Department of Transportation and recognized safe engineering practices for Natural Gas Act projects and the National Electric Safety Code for section 216 Federal Power Act projects.

(d) Pipeline and electric transmission facilities construction.

* * * * *

(f)

* * * * *

(5) For Natural Gas Act projects, the site of above-ground facilities which are visible from nearby residences or public areas, should be planted in trees and shrubs, or other appropriate landscaping and

should be installed to enhance the appearance of the facilities, consistent with operating needs.

9. A new § 380.16 is added to read as follows:

§ 380.16 Environmental reports for section 216 Federal Power Act Permits.

(a) Introduction.

(1) The applicant must submit an environmental report with any application that proposes the construction or modification of any facility identified in § 380.3(c)(3). The environmental report must include the 11 resource reports and related material described in this section.

(2) The detail of each resource report must be commensurate with the complexity of the proposal and its potential for environmental impact. Each topic in each resource report must be addressed or its omission justified, unless the data is not required for that type of proposal. If material required for one resource report is provided in another resource report or in another exhibit, it may be cross referenced. If any resource report topic is required for a particular project but is not provided at the time the application is filed, the environmental report must explain why it is missing and when the applicant anticipates it will be filed.

(b) General requirements. As appropriate, each resource report must:

(1) Address conditions or resources that are likely to be directly or indirectly affected by the project;

(2) Identify significant environmental effects expected to occur as a result of the project;

(3) Identify the effects of construction, operation (including maintenance and malfunctions), as well as cumulative effects resulting from existing or reasonably foreseeable projects;

(4) Identify measures proposed to enhance the environment or to avoid, mitigate, or compensate for adverse effects of the project; and

(5) Provide a list of publications, reports, and other literature or communications, including agency contacts, that were cited or relied upon to prepare each report. This list must include the names and titles of the persons contacted, their affiliations, and telephone numbers.

(6) Whenever this section refers to "mileposts" the applicant may substitute "survey centerline stationing" if so preferred. However, whatever method is chosen must be used consistently throughout the resource reports.

(c) Resource Report 1: General project description. This report must describe facilities associated with the project, special construction and operation procedures, construction timetables, future

plans for related construction, compliance with regulations and codes, and permits that must be obtained. Resource Report 1 must:

(1) Describe and provide location maps of all project facilities, include all facilities associated with the project (such as transmission line towers, substations, and any appurtenant facilities), to be constructed, modified, replaced, or removed, including related construction and operational support activities and areas such as maintenance bases, staging areas, communications towers, power lines, and new access roads (roads to be built or modified). As relevant, the report must describe the length and size of the proposed transmission line conductor cables, the types of appurtenant facilities that would be constructed, and associated land requirements.

(2) Provide the following maps and photos:

(i) Current, original United States Geological Survey (USGS) 7.5-minute series topographic maps or maps of equivalent detail, covering at least a 0.5-mile-wide corridor centered on the electric transmission facility centerline, with integer mileposts identified, showing the location of rights-of-way, new access roads, other linear construction areas, substations, and construction materials storage areas. Nonlinear construction areas must be shown on maps at a scale of 1:3,600 or larger keyed graphically and by milepost to the right-of-way maps. In areas where the facilities described in paragraph (j)(6) are located, topographic map coverage

must be expanded to depict those facilities.

(ii) Original aerial images or photographs or photo-based alignment sheets based on these sources, not more than one year old (unless older ones accurately depict current land use and development) and with a scale of 1:6,000, or larger, showing the proposed transmission line route and location of transmission line towers, substations and appurtenant facilities, covering at least a 0.5 mile-wide corridor, and including mileposts. The aerial images or photographs or photo-based alignment sheets must show all existing transmission facilities located in the area of the proposed facilities and the location of habitable structures, radio transmitters and other electronic installations, and airstrips. Older images/photographs/alignment sheets must be modified to show any residences not depicted in the original. In areas where the facilities described in paragraph (j)(6) of this section are located, aerial photographic coverage must be expanded to depict those facilities. Alternative formats (e.g., blue-line prints of acceptable resolution) need prior approval by the environmental staff of the Office of Energy Projects.

(iii) In addition to the copies required under § 50.3(b) of this chapter, the applicant must send three additional copies of topographic maps and aerial images/photographs directly to the environmental staff of the Commission's Office of Energy Projects.

(3) Describe and identify by milepost,

proposed construction and restoration methods to be used in areas of rugged topography, residential areas, active croplands and sites where explosives are likely to be used.

(4) Identify the number of construction spreads, average workforce requirements for each construction spread and estimated duration of construction from initial clearing to final restoration, and any identified constraints to the timing of construction.

(5) Describe reasonably foreseeable plans for future expansion of facilities, including additional land requirements and the compatibility of those plans with the current proposal.

(6) Describe all authorizations required to complete the proposed action and the status of applications for such authorizations. Identify environmental mitigation requirements specified in any permit or proposed in any permit application to the extent not specified elsewhere in this section.

(7) Provide the names and mailing addresses of all affected landowners identified in § 50.5(c)(4) of this chapter and certify that all affected landowners will be notified as required in § 50.4(c) of this chapter.

(d) Resource Report 2—Water use and quality. This report must describe water quality and provide data sufficient to determine the expected impact of the project and the effectiveness of

mitigative, enhancement, or protective measures. Resource Report 2 must:

(1) Identify and describe by milepost waterbodies and municipal water supply or watershed areas, specially designated surface water protection areas and sensitive waterbodies, and wetlands that would be crossed. For each waterbody crossing, identify the approximate width, State water quality classifications, any known potential pollutants present in the water or sediments, and any potable water intake sources within three miles downstream.

(2) Provide a description of site-specific construction techniques that will be used at each major waterbody crossing.

(3) Describe typical staging area requirements at waterbody and wetland crossings. Also, identify and describe waterbodies and wetlands where staging areas are likely to be more extensive.

(4) Include National Wetland Inventory (NWI) maps. If NWI maps are not available, provide the appropriate State wetland maps. Identify for each crossing, the milepost, the wetland classification specified by the U.S. Fish and Wildlife Service, and the length of the crossing. Include two copies of the NWI maps (or the substitutes, if NWI maps are not available) clearly showing the proposed route and mileposts. Describe by milepost, wetland crossings as determined by field delineations using the current Federal methodology.

(5) Identify aquifers within excavation depth in the project area, including the depth of the aquifer, current and projected use, water quality, and known or suspected contamination problems.

(6) Discuss proposed mitigation measures to reduce the potential for adverse impacts to surface water, wetlands, or groundwater quality. Discuss the potential for blasting to affect water wells, springs, and wetlands, and measures to be taken to detect and remedy such effects.

(7) Identify the location of known public and private groundwater supply wells or springs within 150 feet of proposed construction areas. Identify locations of EPA or

State-designated, sole-source aquifers and wellhead protection areas crossed by the proposed transmission line facilities.

(e) Resource Report 3—Fish, wildlife, and vegetation. This report must describe aquatic life, wildlife, and vegetation in the vicinity of the proposed project; expected impacts on these resources including potential effects on biodiversity; and proposed mitigation, enhancement, or protection measures. Resource Report 3 must:

(1) Describe commercial and recreational warmwater, coldwater, and saltwater fisheries in the affected area and associated significant habitats such as spawning or rearing areas and estuaries.

(2) Describe terrestrial habitats, including wetlands, typical wildlife habitats, and rare, unique, or otherwise significant habitats that might be affected by the proposed action. Describe typical species that have commercial, recreational, or aesthetic value.

(3) Describe and provide the affected acreage of vegetation cover types that would be affected, including unique ecosystems or communities such as remnant prairie or old-growth forest, or significant individual plants, such as old-growth specimen trees.

(4) Describe the impact of construction and operation on aquatic and terrestrial species and their habitats, including the possibility of a major alteration to ecosystems or biodiversity, and any potential impact on State-listed endangered or threatened species. Describe the impact of maintenance, clearing and treatment of the project area on fish, wildlife, and vegetation. Surveys may be required to determine specific areas of significant habitats or communities of species of special concern to State, Tribal, or local agencies.

(5) Identify all Federally-listed or proposed threatened or endangered species and critical habitat that potentially occur in the vicinity of the project. Discuss the results of the consultation requirements listed in § 380.13(b) through § 380.13(b)(5)(i) and include any written correspondence that resulted from the consultation. The initial application must include the results of any required surveys unless seasonal considerations make this impractical. If species

surveys are impractical, there must be field surveys to determine the presence of suitable habitat unless the entire project area is suitable habitat.

(6) Identify all Federally-listed essential fish habitat (EFH) that potentially occurs in the vicinity of the project. Provide information on all EFH, as identified by the pertinent Federal fishery management plans, that may be adversely affected by the project and the results of abbreviated consultations with NMFS, and any resulting EFH assessments.

(7) Describe site-specific mitigation measures to minimize impacts on fisheries, wildlife, and vegetation.

(8) Include copies of correspondence not provided under paragraph (e)(5) of this section, containing recommendations from appropriate Federal and State fish and wildlife agencies to avoid or limit impact on wildlife, fisheries, and vegetation, and the applicant's response to the recommendations.

(f) Resource Report 4—Cultural resources. In order to prepare this report, the applicant must follow the principles in § 380.14.

(1) Resource Report 4 must contain:

(i) Documentation of the applicant's initial cultural resources consultations, including consultations with Native Americans and other interested persons (if appropriate);

(ii) Overview and Survey Reports, as appropriate;

(iii) Evaluation Report, as appropriate;

(iv) Treatment Plan, as appropriate; and

(v) Written comments from State Historic Preservation Officer(s) (SHPO), Tribal Historic Preservation Officers (THPO), as appropriate, and applicable land-managing agencies on the reports in paragraphs (f)(1)(i) through (iv) of this section.

(2) The initial application or pre-filing documents, as applicable, must include the documentation of initial cultural resource consultation(s), the Overview and Survey Reports, if required, and written comments from SHPOs, THPOs, and land-managing agencies, if available. The initial cultural resources consultations should establish the need for surveys. If surveys are deemed necessary by the consultation with the SHPO/THPO, the survey reports must be filed with the initial application or pre-filing documents.

(i) If the comments of the SHPOs, THPOs, or land-management agencies are not available at the time the application is filed, they may be filed separately, but they must be filed before a permit is issued.

(ii) If landowners deny access to private property and certain areas are not surveyed, the

unsurveyed area must be identified by mileposts, and supplemental surveys or evaluations must be conducted after access is granted. In those circumstances, reports, and treatment plans, if necessary, for those inaccessible lands may be filed after a permit is issued.

(3) The Evaluation Report and Treatment Plan, if required, for the entire project must be filed before a permit is issued.

(i) In preparing the Treatment Plan, the applicant must consult with the Commission staff, the SHPO, and any applicable THPO and land-management agencies.

(ii) Authorization to implement the Treatment Plan will occur only after the permit is issued.

(4) Applicant must request privileged treatment for all material filed with the Commission containing location, character, and ownership information about cultural resources in accordance with § 388.112 of this chapter. The cover and relevant pages or portions of the report should be clearly labeled in bold lettering: "CONTAINS PRIVILEGED INFORMATION—DO NOT RELEASE."

(5) Except as specified in a final Commission order, or by the Director of the Office of Energy Projects, construction may not begin until all cultural resource reports and plans have been approved.

(g) Resource Report 5—Socioeconomics. This report must identify and quantify the impacts of constructing and operating the proposed project on factors affecting towns and counties in the vicinity of the project. Resource Report 5 must:

(1) Describe the socioeconomic impact area.

(2) Evaluate the impact of any substantial immigration of people on governmental facilities and services and plans to reduce the impact on the local infrastructure.

(3) Describe on-site manpower requirements and payroll during construction and operation, including the number of construction personnel who currently reside within the impact area, will commute daily to the site from outside the impact area, or will relocate temporarily within the impact area.

(4) Determine whether existing housing within the impact area is sufficient to meet the needs of the additional population.

(5) Describe the number and types of residences and businesses that will be displaced by the project, procedures to be used to acquire these properties, and types and amounts of relocation assistance payments.

(6) Conduct a fiscal impact analysis evaluating incremental local government expenditures in relation to incremental local government revenues that will result from construction of the project. Incremental expenditures include, but are not limited to, school operating costs, road maintenance and repair, public safety, and public utility costs.

(h) Resource Report 6—Geological resources. This report must describe geological resources and hazards in the project area that might be directly or indirectly affected by the proposed action or that could place the proposed facilities at risk, the potential effects of those hazards on the facility, and methods proposed to reduce the effects or risks. Resource Report 6 must:

(1) Describe, by milepost, mineral resources that are currently or potentially exploitable.

(2) Describe, by milepost, existing and potential geological hazards and areas of nonroutine geotechnical concern, such as high seismicity areas, active faults, and areas susceptible to soil liquefaction; planned, active, and abandoned mines; karst terrain; and areas of potential ground failure, such as subsidence, slumping, and landsliding. Discuss the hazards posed to the facility from each one.

(3) Describe how the project will be located or designed to avoid or minimize adverse effects to the resources or risk to itself, including geotechnical investigations and monitoring that would be conducted

before, during, and after construction. Discuss also the potential for blasting to affect structures, and the measures to be taken to remedy such effects.

(4) Specify methods to be used to prevent project-induced contamination from surface mines or from mine tailings along the right-of-way and whether the project would hinder mine reclamation or expansion efforts.

(i) Resource Report 7—Soils. This report must describe the soils that will be affected by the proposed project, the effect on those soils, and measures proposed to minimize or avoid impact. Resource Report 7 must:

(1) List, by milepost, the soil associations that would be crossed and describe the erosion potential, fertility, and drainage characteristics of each association.

(2) Identify, by milepost, potential impact from: soil erosion due to water, wind, or loss of vegetation; soil compaction and damage to soil structure resulting from movement of construction vehicles; wet soils and soils with poor drainage that are especially prone to structural damage; damage to drainage tile systems due to movement of construction vehicles and trenching activities; and interference with the operation of agricultural equipment due to the possibility of large stones or blasted rock occurring on or near the surface as a result of construction.

(3) Identify, by milepost, cropland, and residential areas where loss of soil fertility due to construction activity can occur. Indicate which are classified as prime or unique farmland by the U.S. Department of Agriculture, Natural Resources Conservation Service.

(j) Resource Report 8—Land use, recreation, and aesthetics. This report must describe the existing uses of land on, and (where specified) within 0.25 mile of, the edge of the proposed transmission line right-of-way and changes to those land uses that will occur if the project is approved. The report must discuss proposed mitigation measures, including protection and enhancement of existing land use. Resource Report 8 must:

(1) Describe the width and acreage requirements of all construction and permanent rights-of-way required for project construction, operation and maintenance.

(i) List, by milepost, locations where the proposed right-of-way would be adjacent to existing rights-of-way of any kind.

(ii) Identify, preferably by diagrams, existing rights-of-way that will be used for a portion of the construction or operational right-of-way, the overlap and how much additional width will be required.

(iii) Identify the total amount of land to be purchased or leased for each project facility, the

amount of land that would be disturbed for construction, operation, and maintenance of the facility, and the use of the remaining land not required for project operation and maintenance, if any.

(iv) Identify the size of typical staging areas and expanded work areas, such as those at railroad, road, and waterbody crossings, and the size and location of all construction materials storage yards and access roads.

(2) Identify, by milepost, the existing use of lands crossed by the proposed transmission facility, or on or adjacent to each proposed project facility.

(3) Describe planned development on land crossed or within 0.25 mile of proposed facilities, the time frame (if available) for such development, and proposed coordination to minimize impacts on land use. Planned development means development which is included in a master plan or is on file with the local planning board or the county.

(4) Identify, by milepost and length of crossing, the area of direct effect of each proposed facility and operational site on sugar maple stands, orchards and nurseries, landfills, operating mines, hazardous waste sites, wild and scenic rivers, designated trails, nature preserves, game management areas, remnant prairie, old-growth forest, national or State forests, parks, golf courses, designated natural, recreational or scenic areas, or registered natural landmarks, Native American religious sites and

traditional cultural properties to the extent they are known to the public at large, and reservations, lands identified under the Special Area Management Plan of the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, and lands owned or controlled by Federal or State agencies or private preservation groups. Also identify if any of those areas are located within 0.25 mile of any proposed facility.

(5) Tribal resources. Describe Indian tribes, tribal lands, and interests that may be affected by the project.

(i) Identify Indian tribes that may attach religious and cultural significance to historic properties within the project right-of-way or in the project vicinity, as well as available information on Indian traditional cultural and religious properties, whether on or off of any Federally-recognized Indian reservation.

(ii) Information made available under this section must delete specific site or property locations, the disclosure of which will create a risk of harm, theft, or destruction of archaeological or Native American cultural resources or to the site at which the resources are located, or which would violate any Federal law, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470w-3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh.

(6) Identify, by milepost, all residences and buildings within 200 feet of the edge of the proposed transmission line construction right-of-way and the distance of the residence or building from the edge of the right-of-way. Provide survey drawings or alignment sheets to illustrate the location of the transmission facilities in relation to the buildings.

(i) Buildings: List all single-family and multi-family dwellings and related structures, mobile homes, apartment buildings, commercial structures, industrial structures, business structures, churches, hospitals, nursing homes, schools, or other structures normally inhabited by humans or intended to be inhabited by humans on a daily or regular basis within a 0.5-mile-wide corridor centered on the proposed transmission line alignment. Provide a general description of each habitable structure and its distance from the centerline of the proposed project. In cites, towns, or rural subdivisions, houses can be identified in groups. Provide the number of habitable structures in each group and list the distance from the centerline to the closest habitable structure in the group.

(ii) Electronic installations: List all commercial AM radio Transmitters located within 10,000 feet of the centerline of the proposed project and all FM radio transmitters, microwave relay stations, or other similar electronic installations located within 2,000 feet of the centerline of the proposed project. Provide a general description of each installation and its distance from the centerline of the projects. Locate all installations on a routing map.

(iii) Airstrips: List all known private airstrips within 10,000 feet of the centerline of the project. List all airports registered with the Federal Aviation Administration (FAA) with at least one runway more than 3,200 feet in length that are located within 20,000 feet of the centerline of the proposed project. Indicate whether any transmission structures will exceed a 100:1 horizontal slope (one foot in height for each 100 feet in distance) from the closest point of the closest runway. List all airports registered with the FAA having no runway more than 3,200 feet in length that are located within 10,000 feet of the centerline of the proposed project. Indicate whether any transmission structures will exceed a 50:1 horizontal slope from the closest point of the closest runway. List all heliports located within 5,000 feet of the centerline of the proposed project. Indicate whether any transmission structures will exceed a 25:1 horizontal slope from the closest point of the closest landing and takeoff area of the heliport. Provide a general description of each private airstrip, registered airport, and registered heliport, and state the distance of each from the centerline of the proposed transmission line. Locate all airstrips, airports, and heliports on a routing map.

(7) Describe any areas crossed by or within 0.25 mile of the proposed transmission project facilities which are included in, or are designated for study for inclusion in: The National Wild and Scenic Rivers System (16 U.S.C. 1271); The National Trails System (16 U.S.C. 1241); or a wilderness area designated under the Wilderness Act (16 U.S.C. 1132).

(8) For facilities within a designated coastal zone management area, provide a consistency determination or evidence that the applicant has requested a consistency determination from the State's coastal zone management program.

(9) Describe the impact the project will have on present uses of the affected areas as identified above, including commercial uses, mineral resources, recreational areas, public health and safety, and the aesthetic value of the land and its features. Describe any temporary or permanent restrictions on land use resulting from the project.

(10) Describe mitigation measures intended for all special use areas identified under this section.

(11) Describe the visual characteristics of the lands and waters affected by the project. Components of this description include a description of how the transmission line project facilities will impact the visual character of project right-of-way and surrounding vicinity, and measures proposed to lessen these impacts. Applicants are encouraged to supplement the text description with visual aids.

(12) Demonstrate that applications for rights-of-way or other proposed land use have been or soon will be filed with Federal land-management agencies with jurisdiction over land that would be affected by the project.

(k) Resource Report 9—Alternatives. This

report must describe alternatives to the project and compare the environmental impacts of such alternatives to those of the proposal. It must discuss technological and procedural constraints, costs, and benefits of each alternative. The potential for each alternative to meet project purposes and the environmental consequences of each alternative must be discussed. Resource Report 9 must:

(1) Discuss the "no action" alternative and other alternatives given serious consideration to achieve the proposed objectives.

(2) Provide an analysis of the relative environmental benefits and impacts of each such alternative, including but not limited to:

(i) For alternatives considered in the initial screening for the project but eliminated, describe the environmental characteristics of each alternative, and the reasons for rejecting it. Where applicable, identify the location of such alternatives on maps of sufficient scale to depict their location and relationship to the proposed action, and the relationship of the transmission facilities to existing rights-of-way; and

(ii) For alternatives that were given more in-depth consideration, describe the environmental characteristics of each alternative and the reasons for rejecting it. Provide comparative tables showing the differences in environmental characteristics for the alternative and proposed action. The location, where applicable, of any alternatives in this paragraph shall

be provided on maps equivalent to those required in paragraph (c)(2) of this section.

(l) Resource Report 10—Reliability and safety. This report must address the potential hazard to the public from facility components resulting from accidents or natural catastrophes, how these events will affect reliability, and what procedures and design features have been used to reduce potential hazards. Resource Report 10 must:

(1) Describe measures proposed to protect the public from failure of the proposed facilities (including coordination with local agencies).

(2) Discuss hazards, the environmental impact, and service interruptions which could reasonably ensue from failure of the proposed facilities.

(3) Discuss design and operational measures to avoid or reduce risk.

(4) Discuss contingency plans for maintaining service or reducing downtime.

(5) Describe measures used to exclude the public from hazardous areas. Discuss measures used to minimize problems arising from malfunctions and accidents (with estimates of probability of occurrence) and identify standard procedures for protecting services and public safety during maintenance and breakdowns.

(6) Provide a description of the electromagnetic fields to be generated by the proposed transmission lines, including their strength and extent. Provide a depiction of the expected field compared to distance horizontally along the right-of-way under the conductors, and perpendicular to the centerline of the right-of-way laterally.

(7) Discuss the potential for acoustic and electrical noise from electric and magnetic fields, including shadowing and reradiation, as they may affect health or communication systems along the transmission right-of-way. Indicate the noise level generated by the line in both dB and dBA scales and compare this to any known noise ordinances for the zoning districts through which the transmission line will pass.

(8) Discuss the potential for induced or conducted currents along the transmission right-of-way from electric and magnetic fields.

(m) Resource Report 11—Design and Engineering. This report consists of general design and engineering drawings of the principal project facilities described under Resource Report 1—General project description. If the version of this report submitted with the application is preliminary in nature, applicant must state that in the application. The drawings must conform to the specifications determined in the initial consultation meeting required by § 50.5(b) of this chapter.

(1) The drawings must show all major project structures in sufficient detail to provide a full understanding of the project including:

(i) Plans (overhead view);

(ii) Elevations (front view);

(iii) Profiles (side view); and

(iv) Sections.

(2) The applicant may submit preliminary design drawings with the pre-filing documents or application. The final design drawings may be submitted during the construction permit process or after the Commission issues a permit and must show the precise plans and specifications for proposed structures. If a permit is granted on the basis of preliminary designs, the applicant must submit final design drawings for written approval by the Director of the Office of Energy Project's prior to commencement of any construction of the project.

(3) Supporting design report. The applicant must submit, at a minimum, the following supporting information to demonstrate that existing and proposed structures are safe and adequate to fulfill their stated functions and must submit such information in a separate report at the time the application is filed:

(i) An assessment of the suitability of the transmission line towers and appurtenant structures

locations based on geological and subsurface investigations, including investigations of soils and rock borings and tests for the evaluation of all foundations and construction materials sufficient to determine the location and type of transmission line tower or appurtenant structures suitable for the site;

(ii) Copies of boring logs, geology reports, and laboratory test reports;

(iii) An identification of all borrow areas and quarry sites and an estimate of required quantities of suitable construction material;

(iv) Stability and stress analyses for all major transmission structures and conductors under all probable loading conditions, including seismic, wind, and ice loading, as appropriate, in sufficient detail to permit independent staff evaluation.

(4) The applicant must submit two copies of the supporting design report described in paragraph (m)(3) of this section at the time preliminary and final design drawings are filed. If the report contains preliminary drawings, it must be designated a ``Preliminary Supporting Design Report.''

Note: The following Appendix will not be published in the Code of Federal Regulations.

Appendix

List of Commenters

Affiliated Tribes of Northwest Indians
Allegheny Power
American Electric Power Service Corp.
American Public Power Association
American Transmission Co.
California Public Utilities Commission
California Resources Agency
Center for Biological Diversity
Communities Against Regional Interconnect
Confederate Tribes of the Warm Springs Reservation of Oregon
Edison Electric Institute
Imperial Irrigation District
Iowa Utilities Board
Kentucky Public Service Commission
Lackawaxen River Conservancy
Los Angeles Department of Water and Power
Massachusetts Energy and Facilities Siting Board
National Association of Regulatory Utility Commissioners
National Electric Manufacturers Association
National Grid USA
National Parks Conservation Association
National Rural Electric Cooperative Association
New Jersey Board of Public Utilities
New York Department of Public Service

New York Independent System Operator
New York State Senator Wright
Northern Wasco Peoples Utility District
Old Dominion Electric Cooperative
Pacific Gas and Electric Co.
Pennsylvania Public Utilities Commission
PEPCO Holdings, Potomac Electric Power Co.,
Delmarva Power & Light Co., and Atlantic City
Electric Co.
PPL Electric Utilities Corp.
Progress Energy
PSEG Companies
Public Service Commission of Wisconsin
Reinhardt, Laura and John
San Diego Gas & Electric
Sayward, Mazur
Seattle City Light
Southern California Edison Co.
Southern Company Services
Star Group
The Wilderness Society
U.S. Department of the Interior
Virginia Electric and Power Co.
Virginia Farm Bureau Federation
Washington Energy Facility Site Evaluation Council
Western Governor's Association
Western Interstate Energy Board and Committee on
Regional Electric Power Cooperation
White Mountain Apache Tribe
Wyoming Infrastructure Authority

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities

Docket No. RM06-12-000

(November 16, 2006)

KELLY, Commissioner, dissenting in part:

Section 216(b)(1)(c)(i) of the Federal Power Act provides that the Commission may issue a permit for the construction of an electric transmission line if the State having the authority to site the line has

> (i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric corridor, whichever is later.

The majority finds that this language also means that the Commission can issue a permit for the construction of an electric transmission line if the State has denied the permit application. I believe the majority's interpretation flies in the face of the plain language of the statute, the purposes of the statute, well-established principles of statutory interpretation and supporting case law, and inappropriately

preempts the States in the process.

When interpreting a statute, there is an understanding that Congress says what it means and means what it says therefore, the court will first determine whether the language at issue has a plain and unambiguous meaning.[1] To that end, words will be interpreted as taking their ordinary, contemporary, common meaning.[2]

The word "withhold" is variously defined as "to refrain from giving, granting, or permitting" (American Heritage Dictionary), "to hold back...keep from action—to desist or refrain from granting, giving, or allowing" (Webster's Dictionary), and "to omit to disclose upon request; as, to withhold information" (Black's Law Dictionary). In my view, it defies common sense to insert the concept of "reject" or "deny" into this universally acknowledged definition.

Moreover statutory provisions must be read in context.[3] The language at issue here is not, as the majority asserts, "withheld approval." Rather, it is "withheld approval for more than 1 year after the filing of an application." When "withheld approval" is read in its appropriate context, it simply cannot mean

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[1]Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 120 S.Ct. 1942, 1947 (2000).

[2]Perrin v. United States, 444 U.S. 37, 42 (1979).

[3]Bailey v. United States, 516 U.S. 137, 145 (1995).

"deny," because otherwise the provision must be read to mean that the Commission would have jurisdiction when a state has "denied approval for more than 1 year after the filing of an application." This reading is nonsensical; yet to read it as the majority does would render the phrase "for more than one year" superfluous. As noted in Cooper Industries, Inc. Aviall Services – the very opinion the majority cites for the notion that it must give every word in a statute some operative effect – any reading that would render part of a statute entirely superfluous is something a court should be "loath to do."[4]

States have always had exclusive, plenary jurisdiction over transmission siting.[5] In 2005, Congress passed EPAct, which, for the first time, carefully carves out a limited role for the federal government in the area of transmission siting. EPAct amended the FPA to give the Commission the authority to site electric transmission facilities in five

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[4]Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004).

[5]FPA section 201(a) confers to the Commission jurisdiction over the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce, and notes that such regulation extends "only to those matters which are not subject to regulation by the States." See also New York v. FERC, 535 U.S. 1, 24 (2002) ("FERC has recognized that the States retain significant control over local matters"), citing Order No. 888 at 31,782 & n. 543, FERC Stats. & Regs., Regs. Preamble, Jan. 1991-June 1996, ¶ 31,036, 31,632, 61 Fed. Reg. 21540 (1996) ("Among other things, Congress left to the States authority to regulate generation and transmission siting").

specific situations.[6] The majority's interpretation of Section 216(b)(1)(C)(i) would add a sixth situation: the Commission would have jurisdiction to approve the siting of a transmission line pursuant to federal law where the State has lawfully denied an application pursuant to state law.

The authority to lawfully deny a permit is critically important to the States for ensuring that the interests of local communities and their citizens are protected. What the Commission does today is a significant inroad into traditional state transmission siting authority. It gives states two options: either issue a permit, or we'll do it for them. Obviously this is no choice. This is preemption.

Courts "have long presumed that Congress does not cavalierly pre-empt" state law.[7] Indeed, courts should not find federal pre-emption "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[8] In short, courts must start with the "basic assumption

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[6]See Section 216(b)(1) subsections (A)(i), (A)(ii), B, (C)(i), (C)(ii).

[7]Meditronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

[8]Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963); See also Gregory v. Ashcroft, 501 U.S. 452 (1991) (for a court to find federal pre-emption, it must be "unmistakably clear" that Congress intended to do so).

that Congress did not intend to displace state law."[9]

There is no evidence to counter this "presumption against pre-emption." To the contrary, I find it inconceivable that Congress would have specifically listed in section 216(b)(1) a number of circumstances that will trigger Commission jurisdiction, yet fail to include on that list denial of a permit. If Congress had intended to take away the States' authority to lawfully deny a permit, surely it would have said so in unmistakable terms.

Like me, I suspect that many will be surprised by the majority's interpretation. The Commission received 51 letters commenting on the proposed rule, including many that delved into minute details of the rule. Yet, no one opined, let alone argued, that the Commission has jurisdiction if a State denies a permit.

Indeed, there is evidence beyond the plain meaning of the statute that Congress did not intend to give the Commission the authority to override a State's denial of a permit application. In Section 216(b)(1)(A)(ii), Congress told the States that they cannot retain jurisdiction to site transmission facilities unless they have the authority to "consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State." It makes little sense that Congress would have said, on the one hand, the State

[9]Building & Construction Trades Council v. Associated Builders, 507 U.S. 218 (1993).

has the authority to review a permit application if it takes these factors into account, but on the other hand, it doesn't really matter if the State takes these factors into account because if the State doesn't approve the permit, it loses jurisdiction to the Commission.

I realize that the majority is concerned that the goal of Section 216 to encourage the construction of transmission facilities may be frustrated if our backstop authority does not extend to denials of permits. However, I believe that States, as well as applicants, will act in good faith in processing requests for permits. Moreover, as noted above, Congress included the requirement that States must have the authority to consider the interstate benefits of applicants' proposals. Accordingly, States will be required to look beyond their borders in considering whether to approve or deny permit applications. If a State does not adequately take these benefits into account and denies the permit application, then applicants will have a remedy in court.

For these reasons, I respectfully dissent.

Suedeen G. Kelly

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities

Docket No. RM06-12-001

ORDER DENYING REHEARING

(Issued May 17, 2007)

1. On November 16, 2006, the Commission issued a Final Rule in this proceeding.[1] In the Final Rule, the Commission implemented new regulations in accordance with section 1221 of the Energy Policy Act

[1]Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, Order No. 689, 71 Fed. Reg. 69,440 (Dec. 1, 2006), FERC Stats. & Regs. ¶ 31,234 (2006)(Final Rule).

of 2005 (EPAct 2005) to establish filing requirements and procedures for entities seeking to construct electric transmission facilities. The regulations also provided for the coordination of the processing of requests for federal authorizations and for conducting an environmental review in association with a proposal to construct or modify electric transmission facilities in national interest electric transmission corridors (national corridors).

2. Several parties requested rehearing of the Final Rule.[2] The primary focus of the requests for rehearing is the scope of the Commission's jurisdiction under new Federal Power Act (FPA) section 216(b)(1)(C)(i). That section provides that the Commission may issue a permit for the construction of electric transmission facilities in a national corridor if it finds that a state commission or other entity that has authority to approve the siting of the facilities has "withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; . . . ." Specifically, parties contest

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[2]Communities Against Regional Interconnection (CARI), Edison Electric Institute (EEI), Iowa Utilities Board (Iowa UB), Maine Public Utilities Commission and the Maine Public Advocate (jointly Maine PUC), Minnesota Public Utilities Commission and Minnesota Department of Commerce (jointly Minnesota PUC), National Association of Regulatory Utility Commissioners (NARUC), National Rural Electric Cooperative Association (NRECA), New York Public Service Commission (New York PSC), Piedmont Environmental Council (Piedmont).

the Commission's determination that the phrase "withheld approval" can reasonably be interpreted to include a state's lawful denial of an application to site transmission facilities.

3. Other aspects of the Final Rule that were raised on rehearing include, among others: (1) the Commission's determination to address its jurisdiction over a proposed project when it issues an order on the merits of an application; (2) the Commission's policy not to commence its pre-filing process until one year after a complete application is filed with the state; (3) the weight that will be given an independent agency's determination of the need for a project; (4) the extent of authority delegated to the Commission by DOE; and (5) various NEPA-related issues.

I. Background

4. Section 1221 of EPAct 2005 adds a new section 216 to the FPA providing for federal siting of electric transmission facilities under certain circumstances. Section 216 requires that the Secretary of the Department of Energy (DOE or Secretary) identify transmission constraints and designate certain constrained areas as national corridors. Section 216(b) provides that the Commission may issue permits to construct or to modify electric transmission facilities in a national corridor under certain circumstances.

5. In addition to responsibilities assigned to the Commission by statute, DOE delegated to the Commission its lead agency responsibilities for the purpose of coordinating all applicable federal

authorizations and related environmental review and preparing a single environmental review document for facilities within the Commission's siting jurisdiction.[3] With respect to such projects, the Commission will establish prompt and binding intermediate milestones and ultimate deadlines to help ensure that all federal permits are issued, and reviews are completed, within a year, or as soon as practicable thereafter.

6. FPA section 216(c)(2) requires that the Commission issue rules specifying the form of, and the information to be contained in, an application for proposed construction or modification of electric transmission facilities in national corridors, and the manner of service of notice of the permit application on interested persons. To that end, the Commission issued a Notice of Proposed Rulemaking (NOPR) on June 16, 2006, seeking comments on the Commission's proposal to comply with section 216. [4] After considering comments on the NOPR, the Commission issued its Final Rule implementing those regulations in a new Part 50 of existing subchapter B of its regulations. The procedures also required certain modifications to other existing regulations, including the Commission's regulations implementing the National Environmental Policy Act of 1969 (NEPA) in Part 380.

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[3]Department of Energy Delegation Order No. 00-004.00A.

[4]Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 36,258 (June 26, 2006); FERC Stats. & Regs.¶ 32,605 (2006).

II. Discussion

A. Withheld Approval/Denying Applications

7. As stated, section 216(b)(1)(C), provides that the Commission may issue a permit for the construction of electric transmission facilities in a national corridor if it finds that a state commission or other entity that has authority to approve the siting of the facilities has "withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; . . ."

8. In the Final Rule, the Commission noted that section 216(b)(1)(C) did not explicitly define the full range of state actions that are deemed to be withholding approval. In response to requests that the Commission determine if a state's lawful denial of a request to site an electric transmission facility would be deemed to be withholding approval, the Commission stated that a reasonable interpretation of the language in the context of the legislation did indeed support a finding that withholding approval includes such a denial.

9. CARI, Piedmont, Minnesota PUC, and New York PSC request rehearing of the Commission's determination that the phrase "withheld approval" can reasonably be interpreted to include a state's lawful

denial of an application to site transmission facilities.[5]

1. The Commission's Interpretation of the Phrase "Withheld Approval" and the Effect of the Phrase "for more than 1 year"

10. On rehearing, CARI, Piedmont, Minnesota PUC, and New York PSC argue that when "withheld approval" is read in the context of "withheld approval for more than 1 year," it cannot mean "deny" because that interpretation would render the phrase "for more than 1 year" superfluous. Piedmont argues that while "withheld" and "denied" can be synonyms as used in certain contexts, "context is king" in construing a statute.[6] CARI asserts that the Commission's attempt to use dictionary definitions of the terms "withhold" and "deny" does not support its interpretation. It states that the Commission's approach is backwards, as though Congress actually used the term "denial" in the statute rather than "withheld." CARI argues that the term carefully chosen by Congress was "withheld,"

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[5]We note that agencies from only two states, New York and Minnesota, question the Commission's finding that it may assert jurisdiction over a proposed facility if a state denies an application. Further, NARUC did not seek rehearing on this issue.

[6]Citing Wachovia Bank v. United States, 455 F.3d 1261, 1268 (11th Cir. 2006)("we do not read words . . . in isolation" but instead "in context" and "try to make them and their near and far kin make sense together, have them singing on the same note, as harmoniously as possible").

and based both on the common dictionary definitions and the canons of statutory interpretation, that term clearly does not include a valid, formal administrative denial appealable to a state court.

11. We find the parties' arguments unpersuasive. The Commission continues to believe that a reasonable interpretation of the language of the legislation supports a finding that a state's withholding approval includes a state's denial of an application.[7] The parties argue that the concept of a state having "denied approval for more than 1 year" is nonsensical, and thus, the word "withheld" cannot be interpreted to include "denied." However, that argument ignores the fact that the term as used in the EPAct 2005 is inclusive, comprising "denying" approval as well as "refraining" or "holding back" from granting approval. The parties "nonsensical" reading can only be rendered by reading "withheld approval" to only mean "deny," while the Final Rule interprets it to mean both "deny" and "failure to act." We believe the most common sense reading of "withheld approval for more than 1 year" encompasses any action – whether it is a failure to act or an outright denial – that results in an applicant not having received state approval at the end of one year.

12. As noted in the Final Rule, the transmission

[7]Perrin v. United States, 444 U.S. 37, 42 (1979)(finding a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning).

siting language first appeared in legislation considered in the House of Representatives in 2003. That measure (H.R. 6) allowed the Commission to exercise jurisdiction where a state entity with transmission siting authority "has withheld approval, conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce and is otherwise not economically feasible, or delayed final approval for more than one year after the filing of an application seeking approval . . . ."[8] The report language accompanying the above legislative text states, "The section provides that for such lines, persons may obtain a permit from FERC and exercise eminent domain if, after one year, a State is unable or refuses to site the line."[9] The Commission stated that the fact that this precursor to the transmission siting provision of EPAct 2005 distinguished "withholding approval" from "delaying final approval for more than one year" and was interpreted to include a state "refusing to site a line" supports its conclusion that "withholding approval" was intended to mean something beyond a failure to act.

13. Piedmont and CARI contend that the Commission cannot rely on an earlier proposed bill which was never enacted to support its interpretation that Congress meant something more than mere delay or failure to act when it retained the term "withheld

[8]H.R. 6, 108th Cong. § 16012 (2003).

[9]H.R. Rep No. 108-65 (April 6, 2003).

approval" and dropped "delayed final approval" in the enacted version. CARI contends that there is no legislative history indicating why the language was changed or if the issue was ever addressed, and as such, no significance should be attributed to it. Piedmont agrees that a state's inability to site a transmission line or refusal to act because of political opposition or lack of time and experience would trigger the Commission's jurisdiction under section 216. It argues, however, that neither inability nor refusal to act is the same as a state or local decision to deny approval made in a timely fashion.

14. CARI also points to Senate Report 109-78 which states that EPAct 2005 would authorize the Commission "to issue siting permits if a State withholds approval inappropriately," in contending that it is clear that the conditional jurisdiction granted to the Commission applies only when a state is unable to act, refrains from acting through delay, or inappropriately refuses to act. CARI argues that Congress did not intend to give the Commission preemptive and appellate jurisdiction when a state licensing entity appropriately exercises its authority to determine the approval or denial of a license application.

15. The Commission acknowledges, as do the parties seeking rehearing, that there is no definitive legislative history on point. However, we continue to believe that our interpretation of the phrase "withhold approval" to include denial of an application is reasonable. The Congressional Budget Office's cost

estimate for EPAct 2005 suggests a similar interpretation, stating:

> Section 1221 would authorize FERC to issue construction permits for electric transmission facilities in "interstate congestion areas" when a state has not acted on or has rejected a permit request.[10]

2. The Commission's Jurisdictional Basis

16. The Minnesota PUC and New York PSC argue that Congress carefully carved out a limited role for the federal government in the area of transmission siting. They contend that section 216(b)(1) gives the

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[10]H.R.Rep. No. 109-215, at 227 (2005). In addition, a July 2005 report prepared by the Minority Staff Special Investigations Division of the Committee on Government Reform states that:

> Under section 1221 of H.R. 6, DOE may designate "interstate congestion areas" within which state and local authority to deny or condition a transmission line permit request is severely limited. If a state denies a permit, places certain conditions on a permit, or has not acted on a permit within one year for any reason, including lack of information provided by the applicant, DOE can step in and issue the permit. Staff of H. Commission on Government Reform· Minority Staff Special Investigations Division, 109th Cong., Energy Bill Preempts States and Localities 3 (Comm. Print 2005).

Commission jurisdiction to site electric transmission facilities in five specific situations and that the Commission's interpretation of section 216(b)(1)(C)(i) would add a sixth basis for jurisdiction, allowing the Commission to approve the siting of transmission facilities under federal law in instances where the state has lawfully denied an application. The parties argue that this situation was never contemplated by Congress.

17. Section 216(b)(1) sets forth three categories of circumstances which will give rise to Commission jurisdiction to act on a proposal to site transmission facilities. Section 216(b)(1)(A) covers instances where a state does not have authority to site the proposed facilities or to consider interstate benefits expected to be achieved. Section 216(b)(1)(B) covers instances where the applicant does not qualify to use the siting authority of the state. Section 216(b)(1)(C) covers a third category of circumstances – those where a state has the authority to site the proposed facilities and the applicant is qualified to avail itself of that authority, but where the state, for whatever reason, has failed to authorize the facilities within a one-year period. Under section 216(b)(1)(C), the Commission has jurisdiction to act not only where the state has delayed granting authorization, including, as we have interpreted it, explicitly denying authorization, but also where the state has granted authorization, but has conditioned its approval in a manner which would fail to relieve transmission congestion. There is no definitive legislative history regarding Congress's choice of the word "withheld," but, the underlying

purpose of section 216 is to facilitate the process of siting critical regional transmission lines and facilities, ensuring adequate capacity and increased reliability on the electric transmission grid.[11] Thus, the Commission's interpretation of the term "withheld approval" in the context of the statute furthers the goals, purpose, and intent of the statute.

3. Congress's Use of the Phrase "does not act" Elsewhere in EPAct 2005

18. In support of its interpretation of the term "withheld approval," the Commission pointed out that in amending FPA section 203 in section 1289 of EPAct 2005, Congress specifically used the language "does not act," to define the consequences leading to a merger application being deemed approved. The Commission reasoned that Congress's use of the different phrase "withheld approval" in section 1221 indicated an affirmative expression of a different intent. Piedmont argues that sections 203 and 216 deal with fundamentally different subject matter and

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[11] In Representative Todd Tiahrt's speech in the House of Representatives on April 21, 2005 in support of EPAct 2005 he states:

> H.R. 6 will improve our Nation's electric transmission capacity and reliability. By providing for expedited siting processes on both Federal and private lands, transmission lines will be able to be more efficiently and quickly placed so power can be transmitted across the county. 151 Cong. Rec. E796 (2005).

regulatory processes, and, therefore, the inconsistency of the language should be given no weight.

19. Despite the fact that sections 203 and 216 address different regulatory situations, the Commission has an obligation to construe the legislation as a whole in such a manner as to give every word some operative effect. Interpreting the phrase "withheld approval" to mean the same as "does not act" would fail to do this. Further, we note that section 216(h)(6)(A) also uses the phrase "fails to act" in reference to other federal approvals. The Commission believes it is reasonable to conclude that if Congress had simply meant "failure to act" in the context of section 216, it would have used that language as, in fact, it did in section 216(h)(6)(A) in establishing procedures available when an agency "has failed to act" on a request for a federal authorization required for a transmission facility. Instead, Congress used the phrase "withheld approval," which we interpret it to encompass both deny and failure to act.

20. Congress provided a specific mechanism for states to prevent the Commission's jurisdiction from attaching in that it granted consent in section 216(i) for three or more states to enter into interstate compacts. In such an instance, the "Commission shall have no authority to issue a permit for the construction . . . of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement and the Secretary makes . . . the finding described in subsection (b)(1)(C)." This is an example of Congress

using very clear language to carve out a situation in which the Commission shall not have authority to permit siting of transmission facilities in the face of states having denied an application and lends credence to the Commission's position that if Congress had not intended the Commission to have jurisdiction to site a transmission facility in the face of a denial of such authorization under other circumstances, it could have plainly said so.

4. Preemption

21. CARI, Piedmont, and Minnesota PUC urge the Commission to promulgate a narrow construction of the word "withheld," citing the principle of statutory construction known as the "presumption against preemption." The presumption recognizes that preemption of state law is an "extraordinary power in the federalist system."[12] The parties state that the Supreme Court has explained that when Congress legislates "in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[13] CARI argues that because the phrase "withheld approval" is ambiguous, the Commission must overcome a presumption against federal preemption.

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[12]Citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1996).

[13]Citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); see also Metronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

22. The "presumption against preemption" cited by parties arises when there is a controversy concerning not the scope of the federal government's authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by, the existence of the federal authority.[14] We are not concerned here with the validity of any state law or regulation. Rather, the parties are disputing the scope of the authority granted the Commission in section 216 to act in certain circumstances. Such a case does not involve a "presumption against preemption." Instead, it calls for an examination of the statute to determine what powers Congress has conferred upon the agency, without any presumption one way or the other.[15]

23. While the Commission has had broad authority over the transmission of electric energy in interstate commerce,[16] traditionally, authority to site transmission facilities was left in the hands of the states. However, in enacting section 216, Congress affirmatively granted the Commission jurisdiction to site electric transmission facilities in a national corridor in any instance where the conditions enumerated in section 216(b) are met, clearly preempting the exclusive jurisdiction formerly held by the states. As discussed above, there is substantial textual and contextual support for the Commission's reasonable determination that a state's denial of a

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[14]New York v. FERC, 535 U.S. 1, 17-18 (2002).

[15]Id. at 18.

[16]16 U.S.C. § 824(a) (2005).

transmission application is within the meaning of withholding approval in section 216(b)(1)(C). Both section 216(b)(1)(A) and (B) are preemptive, so there is no question section 216(b)(1) is preemptive. We believe that if Congress had intended to limit the scope of its grant of authority in instances where a state has denied an application, it would have explicitly done so.

B. Jurisdictional Determination

24. In the Final Rule, the Commission indicated that while the language in section 216 would allow for simultaneous state and Commission siting processes where the states have the requisite authority, the Commission does not plan to commence its pre-filing process until one year after the relevant state application has been filed. On rehearing, CARI reiterates their argument that the Commission lacks authority to conduct its pre-filing process before it receives jurisdiction under the statute. CARI contends that section 216(b) provides for a grant of conditional, sequential authority, not parallel or overlapping jurisdiction.

25. NARUC requests that the Commission adopt procedural rules that will provide an opportunity for a state siting authority to obtain a Commission ruling on whether the prerequisites set out in section 216 for federal jurisdiction have been met before the pre-filing process begins. It contends that the Commission's ability to initiate the pre-filing process under its siting authority in cases arising under section 216 (b)(C) is contingent upon the resolution of issues concerning the

action or inaction of the state agency with original jurisdiction.

26. Similarly, Maine PUC contends that it is inefficient for the Commission to address its jurisdiction in a final order on the merits of a proposed project because a lengthy proceeding could take place only to have the Commission ultimately reject the application before it for want of jurisdiction. Maine PUC also asserts that the proposed process might result in the Commission's beginning the permitting process without proper authority. Maine PUC states that a more efficient approach is to have the Commission make a threshold, on the record, determination of jurisdiction. It argues that if there are disputed questions of fact or law as to whether the one-year period has elapsed or whether a state-imposed condition makes the project "not economically feasible," such questions can and should be definitively settled before the pre-filing information gathering process commences. Maine PUC concludes that the pre-filing process should be bifurcated: first, the Commission should establish whether it has jurisdiction; and if it does, then it should proceed to gather information.

27. FPA section 216 authorizes the Commission to issue permits to construct electric transmission facilities in national corridors if the Commission finds that the proposed facilities meet the requirements of section 216(b)(1) through (6). As we discussed in the Final Rule, the language of section 216 allows the Commission to issue a construction permit one year

after the state siting process has begun and requires the Commission to render its decision one year after an application is filed with it. We believe we will need to develop a complete record before we can reach a determination concerning the findings required under section 216(b)(1), including a finding concerning the Commission's jurisdiction over the proposed project.

28. In essence, the filed application is the applicant's assertion that the Commission has jurisdiction over the proposed project and authority to issue a permit to construct the facility. The Commission will review all the evidence before it and determine if the proposal meets all the requirements under section 216(b). If, based on that evidence, the Commission determines that the applicant has not demonstrated that the Commission has jurisdiction under section 216(b)(1), the Commission will dismiss the application. If all the requirements of section 216(b)(1) have been met, the Commission will assert jurisdiction and, make a determination on the merits of the proposed project. The Commission does not need jurisdiction to review an application for a proposed project to determine if, in fact, it has jurisdiction to act on the application.

29. CARI also argues that the authority delegated to the Commission by DOE in section 216(h)(4)(C) to coordinate federal authorizations may not be held by the Commission before it has jurisdiction to authorize a proposed project. CARI asserts that until a national corridor is designated and the other statutory criteria in section 216(b) are met, the Commission has no

authority over electric transmission facilities and would be acting beyond the authorization conferred under the governing statute.[17]

30. FPA section 216(b) sets forth a series of findings the Commission must make before issuing a construction permit for electric transmission facilities in a national corridor. We agree that while the Commission cannot issue a permit to construct a proposed electric transmission facility until it determines that the statutory criteria in section 216(b) have been met, there is no requirement in section 216 that the Commission make findings regarding certain of the criteria before proceeding with its review of an application for such a permit in its entirety. Moreover, the time limits imposed by the statute preclude a general practice of considering and ruling on the jurisdictional aspects of an application before initiating our review of the merits of the proposal. If in a particular proceeding a state agency deems it necessary for the Commission to make a jurisdictional determination prior to issuing an order on the merits of the application, it can file a petition requesting a declaratory order or rule to terminate a controversy or remove uncertainty under section 385.207(a)(2) of the Commission's regulations.

C. Complete Application

[17]Citing Houston Oil & Refining, Inc. v. FERC, 95 F.3d 1126, 1136 Fed. Cir. 1996)(An agency is but a creature of statute that has no greater authority than that conferred under the governing statute).

31. CARI contends that the Commission's Final Rule ignores the statutory language by failing to require in our regulations that the state application be determined complete under state law before the one-year state review period begins. It argues that without such a regulation, siting applicants could effectively subvert the primary siting authority reserved to the state by submitting a deficient application to the state, and then, after a year, seek federal authority to construct the transmission facility. CARI concludes that this clearly was not the intent of Congress in granting the Commission its conditional preemptive authority over electric transmission facility siting in national corridors.

32. CARI asserts that while the Commission recognized that an applicant might not provide complete information to a state in the hopes of frustrating the state's ability to act within one year, the Commission failed to explain how it expects to determine if the applicant has acted in good faith. CARI argues that the Commission ignored the clear language and intent of section 216(b) and is acting outside its statutory authority by not requiring that the one-year clock start only upon the state application being deemed complete by the state licensing authority.

33. NARUC and Maine PUC encouraged the Commission to include a specific provision in its regulations stating that the federal pre-filing process will not commence until one year after the relevant state applications have been filed with the proper state

body. Maine PUC states that while the Commission's intent is clear from the order, it is not clearly articulated in the Commission's regulations. It contends that the Commission's regulations should provide the same direction given in the Final Rule.

34. The Commission does not believe it is necessary to codify its stated policy concerning the potential overlap of federal/state review of transmission applications in the regulations. The Commission's regulations require that the applicant file information concerning the status of the applicant's filings before state agencies at various points during the pre-filing process. Specifically, section 50.5(b)(3) requires that the applicant provide such information for the pre-filing consultation and section 50.5(c)(5) requires that the applicant file information concerning the state proceeding with its initial pre-filing request. Finally, under section 50.6(e)(3)(i), the applicant must file evidence that the state withheld approval for more than one year after the filing of an application seeking approval under applicable law.

35. If an issue arises in a given proceeding concerning the one-year state review process, the Commission will address that issue as appropriate. For example, if questions arise during pre-filing concerning the adequacy of the applicant's effort to site the facility at the state level and Commission staff determines that more processing at the state level is appropriate, it will not hesitate to suspend the pre-filing process while the state process continues.

36. Additionally, as stated in the Final Rule, the Commission believes that it is incumbent on project sponsors and states to work together to site facilities at the state level, as this would be the most expeditious way to site the facilities.[18] To that end, the Commission will make its Dispute Resolution Service available if parties to a state siting proceeding desire assistance to facilitate the resolution of issues at the state level.

D. Simultaneous Processes

37. EEI urged the Commission to permit simultaneous filings to avoid wasteful duplication of effort and to expedite the entire process. It contends that by postponing commencement of the Commission's pre-filing process, the Final Rule poses the likelihood of serious delay in the Commission's review and approval of needed new transmission facilities. EEI argues that given Congress' clear desire for expeditious action, the Commission should reconsider allowing the pre-filing process to occur simultaneously with the state pre-filing, application, and post-filing processes, so as to avoid unnecessary duplication of efforts by applicants and others involved. At a minimum, EEI requests that the Commission ensure that Commission staff give full credit for outreach, information gathering, and analyses already completed in front of other federal and state agencies, to the maximum extent possible, in order to avoid duplication of effort and to speed the

[18]Final Rule at P 115.

siting of needed new transmission facilities in national corridors.

38. The Commission believes that its approach of respecting state jurisdiction by providing the states with one full year to consider siting applications prior to the initiation of the Commission's pre-filing process is consistent with Congress's desire to recognize the states' traditional authority to site electric transmission facilities under their applicable laws. Moreover, the Commission anticipates that most states will want the opportunity to also participate in the Commission's process. Thus, simultaneous proceedings could place an undue burden on a state's resources. The Commission believes that the states should be given a meaningful opportunity to fully process siting applications at the state level before federal proceedings on those projects commence.

39. As stated in the Final Rule, the Commission will consider all activities an applicant has conducted prior to approaching the Commission to commence pre-filing. During pre-filing, the Commission will review the work an applicant has done at the state level, the amount of community outreach an applicant has conducted, and the results of that outreach in determining what further activities may be needed to process an applicant's application for a permit.[19] Further, the Commission will review all filings made in conjunction with any state proceedings to ensure, to

[19]Final Rule at P 95.

the maximum extent possible, that the information developed in state proceedings can be used as appropriate before the Commission.[20]

E. Not Economically Feasible

40. The Iowa UB seeks clarification that if the Commission considers siting a transmission line after a state commission has denied authorization for the proposed line, the Commission will give significant weight to legitimate, state-specific policies and requirements that caused the state to deny authorization. Further, the Iowa UB seeks clarification that the Commission does not interpret the language in the section 216(b)(1)(C)(ii) allowing Commission proceedings when the state "conditioned its approval in such a manner that the proposed construction or modification ...is not economically feasible" to mean that if a state condition results in any cost increase, it will be preempted. Instead, it contends that reasonable costs for meeting important state policy goals should be acceptable to the Commission.

41. In reviewing a request for a permit to site electric transmission facilities, the Commission will consider the record in its entirety, including any actions and findings made in the state proceeding. If an applicant is claiming federal jurisdiction based on section 216(b)(1)(C)(ii), the applicant will have to show

[20]Id. at P 124.

not merely that there would be an increase in costs occasioned by state-imposed conditions, but that the increase in costs would render the project "not economically feasible." In determining whether that is, in fact, the case, the Commission will give due weight to all the evidence in the record on that issue. We note that the statute does not distinguish costs related to "policy goals." However, the Commission will consider whether conditions proposed by a state are required by the public interest.

F. Public Interest Conditions

42. In the Final Rule, the Commission stated that it "will impose appropriate conditions necessary to avoid adverse economic, competitive, environmental, and other effects on the relevant interests from the construction of a new project, and will approve the project only where the public benefits to be achieved outweigh the adverse effects."[21] EEI contends that this language could inappropriately be construed to suggest that the permit applicant has some obligation to make whole every affected party. It requests that the Commission clarify that there is no obligation to make whole every affected party, e.g., compensating a generator whose revenue decreases due to the elimination of a constraint.

43. Protecting the public interest involves balancing the often-competing interests of individual parties

[21]Id. at P 42.

which would be affected by a proposed project. The Commission will address the public interests considerations of each project on a case-by-case basis. However, the Commission does not anticipate imposing an obligation that all entities possibly affected by a proposed transmission facility be made whole.

G. RTO/ISO Oversight

44. In the Final Rule the Commission agreed that determinations by an independent agency, such as an independent system operator (ISO) or regional transmission organization (RTO), should be given due weight in an assessment of whether a particular facility is needed to protect or benefit customers. Thus, the Commission determined that it will consider any such independent determination as a factor in determining whether the statutory criteria have been met.

45. Piedmont contends that, in many instances, no weight is due the determination by an independent agency concerning the need for a proposed facility. It argues that the fact that a proposed electric transmission facility is being overseen by an ISO or RTO should not change the allocation of the burden of proof, since the existence of ISO or RTO oversight neither attests to whether an electric transmission facility is needed nor establishes whether a specific electric transmission facility is the optimal solution to a transmission system need. Piedmont states that the burden of proving that the criteria for eligibility for

construction permits and eminent domain under section 216(b) have been met should remain on the applicant.

46. The burden of proving that a construction permit should be issued for a proposed transmission facility rests upon the applicant. As stated, while the Commission will give the determination of an independent entity, such as an RTO, due weight in our assessment of whether a particular facility is needed to protect or benefit customers, we reiterate that such a determination will be merely one factor in the Commission's evaluation.

H. Joint Transmission Planning

47. NRECA reiterates its argument that the Commission should require applicants to demonstrate that they have conducted a truly open and inclusive joint transmission planning process before beginning the pre-filing process. It states that under FPA section 217(b)(4), the Commission is required to exercise its authority in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities (LSEs) and enables LSEs to secure firm transmission rights on a long-term basis. It asserts that the Commission must recognize that a transmission upgrade does not serve the public interest as required under section 216(b)(3) unless it furthers the long-term transmission needs of all LSEs. Thus, NRECA concludes that the goals of section 217(b)(4) can only be met in the section 216 process if applicants for

permits under section 216 have been required to participate in a truly open and inclusive joint planning process with all affected LSEs before beginning the pre-filing process.

48. NRECA also argues that the Commission must interpret and implement section 216 consistent with its statutory obligations under sections 205 and 206 that require that the Commission ensure that public utilities provide transmission service under rates and terms and conditions that are just and reasonable and not unduly discriminatory or preferential. It surmises that if a transmission plan is unjust, unreasonable, or unduly discriminatory and preferential under section 205 and 206 because it was developed without an open and inclusive process when included LSE transmission customers from the very beginning, it follows that the transmission plan is inconsistent with the public interest under section 216(b)(3). Therefore, NRECA concludes that the Commission must require applicants for permits under section 216 to demonstrate that they have conducted truly open and inclusive joint transmission planning processes before beginning the pre-filing process.

49. Further, NRECA states that the Commission will fail to determine under section 216(b)(5) and (6) that the proposed facility is consistent with sound national energy policy and will maximize to the extent reasonable and economical, the transmission capabilities of existing towers or structures, if it does not require the applicant to use an open and inclusive joint transmission planning process prior to initiating

the pre-filing process. It contends that without the full input of LSEs and transmission owners before pre-filing, the applicant cannot obtain the full scope of information required to design a transmission project that meets these criteria. It argues that a mere consultation process during pre-filing is too little, too late, to ensure that the statutory standards are met.

50. Finally, NRECA states that while the Final Rule summarized its concerns that the Commission should require joint transmission planning, it did not adequately respond to them. NRECA states that the Commission's comments that it expects that the applicant will conduct outreach activities at the planning level prior to commencing the Commission's pre-filing process does not specify a joint planning process as part of the outreach activities. NRECA contends that such vague guidance by the Commission could be interpreted in widely different ways by stakeholders and could jeopardize the Commission's efforts regarding efficient transmission planning.

51. While the Commission encourages applicants for proposed electric transmission facilities to conduct an open and inclusive joint transmission planning process, we will not require such participation as a pre-condition to proposing to construct facilities. The Commission addressed the regional planning requirement in section 217 in Order No. 890, where it required public utility transmission providers to amend their open-access transmission tariffs to require coordinated, open, and transparent transmission planning on both a local and regional

level.[22] The Commission also created a rebuttable presumption that projects resulting from regional planning qualify for incentive rate treatments. [23] We disagree that pre-filing is "a mere consultation process" that is "too little, too late." The purpose of pre-filing is to seek input from all interested individuals so that those comments can be incorporated into the applicant's plan for consideration by the Commission. In reviewing an application for a proposed facility, the Commission will review all planning activities the applicant conducted as part of its application process and will take that information into consideration in determining if the proposed facility is in the public interest.

I. DOE Lead Agency

52. EEI contends that the Final Rule does not adequately reflect that applicants seeking siting approval are likely to have sought federal authorization from other federal agencies prior to filing with the Commission. It states that, on its face, DOE's delegation of lead agency responsibility the

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[22]See Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,226 (March 15, 2007), FERC Stats & Regs., ¶ 31,241, P 435 (2007)(requiring amendments to open access transmission tariffs to require coordinated, open, and transparent transmission planning on both a local and regional level).

[23]Promoting Transmission Investment through Pricing Reform, Order No. 679, 71 Fed. Reg. 43,294 (July 31, 2006), FERC Stats. & Regs. ¶ 31,222 (2006), order on reh'g, Order No. 679-A, FERC Stats. & Regs. ¶ 30,901, PP110-11 (2007).

Commission appears to be effective only upon the filing of an application to site electric transmission facilities in a national corridor and that the Commission's Final Rule appears to have reflected that interpretation. EEI argues that, in practice, applicants seeking a permit from the Commission are likely to have sought authorizations from other federal agencies prior to filing an application with the Commission, in which case EEI concludes that DOE will have performed the lead agency function to that point. EEI states that the Final Rule does not adequately reflect this scenario, thereby increasing the likelihood that the lead agency process will not be effectively and timely implemented.

53. EEI requests that the Commission work closely with DOE to revise the delegation order to more fully delegate lead agency responsibility to the Commission for all transmission facilities in national corridors. EEI also requests the Commission avoid a duplication of efforts to the maximum extent possible by actively participating in the DOE lead agency process and by giving full credit for work completed under that process prior to the applicant seeking a permit from the Commission.

54. As stated in the Final Rule, the Memorandum of Understanding (MOU) entered into by the Commission, DOE, and several other federal agencies, establishes a framework for early coordination of all applicable federal authorizations that will be required

to site an electric transmission facility. [24] The Commission anticipates working with DOE and the other agencies at the onset of any process to site electric transmission facilities in national corridors. The Commission has conferred and is working with DOE to assure that both agencies will be sufficiently prepared to expedite their respective responsibilities related to the review of any facilities appropriately proposed.

J. Minor Modifications

55. EEI requests that the Commission allow minor modifications to an approved transmission facility to address operational needs during the life of that facility, without having to obtain further Commission, or other approvals. As stated in the Final Rule, the Commission's jurisdiction is limited to the issuance of a permit to construct or modify facilities upon the making of certain findings.[25] Section 216 does not confer Commission jurisdiction over the operation or maintenance of those facilities. Thus, any subsequent modifications made after the facilities are constructed and operational will be subject, at least initially, to applicable state law.

K. NEPA Issues

1. Affected Landowner

[24] Final Rule at P 107.

[25] Id. at P 220.

56. CARI contends that the Commission violated section 216(d) and NEPA when it arbitrarily and capriciously restricted the range of impacts to be evaluated for a project to those within a quarter-mile and narrowly defined the definition of "affected landowner" to property owners within 50 feet of the proposed facility. It argues that while the quarter-mile and 50-foot designations might be appropriate for natural gas pipeline projects that are underground, these geographic boundaries have no relevance with respect to a 190-mile long and 160-foot high overhead electric transmission project that has visual, noise, socioeconomic, and other impacts not associated with natural gas pipelines or smaller transmission lines. CARI claims that a fair definition of the area of impact should begin with a minimum of one-half mile and require an evaluation of the impact beyond that point depending on the facility.

57. CARI argues that NEPA requires that a federal agency evaluate the environmental impacts of a proposed action and any adverse environmental effects that cannot be avoided should the proposal be implemented. It asserts that the Council on Environmental Quality (CEQ) implementation regulations explain that the Environmental Impact Statement (EIS) shall provide a full and fair discussion of significant environmental impacts and define effects to include both direct effects that occur at the same time and place, as well as indirect effects, which may occur later in time or farther removed in distance, but are still reasonably foreseeable. CARI contends that the Commission gave no reasoning for arbitrarily and

capaciously cutting off review of a facility's land use impacts or notifying only those landowners within a quarter of a mile.

58. As we stated in the Final Rule, these are minimum filing requirements and each project will have its own unique issues that will need to be considered on a case-by-case basis.[26] The regulations set forth the starting point for the Commission's review and analysis. As additional interests or concerns are identified in an individual proceeding, the Commission will expand the scope of its review as appropriate. Thus, the Commission's review of the impact of the proposed facility is not limited to the information initially filed by the applicant. Through the pre-filing and environmental scoping processes, Commission staff will define the scope of its analysis based on the specific facts and circumstances raised in each individual case. Further, we note that the definition of affected landowners is for purposes of notice of the project, not an assessment of the impacts.

2. Non-Transmission Alternatives

59. In the Final Rule, the Commission stated that in light of the specific facts raised by individual projects, the applicant will be required to address a variety of alternatives, including, where appropriate, alternatives other than new transmission lines. On rehearing, CARI contends that nothing in the regulations requires the siting applicant to discuss

[26]Id. at P 130.

reasonable non-wire or non-transmission alternatives, or any alternatives other than those the applicant itself considered. It argues that section 380.16(k) of the Commission's regulations does not require consideration of any more than the alternatives to which the applicant has given serious consideration. It claims that this allows the applicant to improperly limit the alternatives analysis and does not comply with the Commission's mandate under NEPA. CARI states that the Commission's passing remark that alternatives other than new transmission lines may be considered where appropriate does not take the place of a regulation which properly mandates that such an evaluation take place.

60. Section 380.16(k) of the Commission's regulations requires an applicant to file a resource report describing alternatives to the proposed project and comparing the environmental impacts of such alternatives to those of the proposal. In the Final Rule, we explained that "in light of the specific facts raised by the individual projects, the applicant will be required to address a variety of alternatives in the resource reports, including, where appropriate, alternatives other than new transmission lines. Moreover, reasonable alternatives can be identified by Commission staff or other stakeholders at various points during the proceeding for consideration in the NEPA process."[27]

[27]See Final Rule at PP 177-79.

61. During the pre-filing and application processes, Commission staff will work with the applicant and stakeholders to define issues in each proceeding, including the development of appropriate alternatives. As required by NEPA, the Commission's environmental review of a proposal will include the detailed examination of all reasonable alternatives to the proposed action.[28] The public will have the opportunity to participate and file comments - which can include suggested alternatives of any kind - throughout this review. When the Commission acts on an application, it will consider the entire record, including the NEPA document and all filings made by participants.

62. Because the facts of each case will dictate which alternatives merit detailed consideration, we are hesitant to include in our regulations specific requirements that applicants study and report on particular types of alternatives in every case. However, we are confident that the requirement that applicants address a variety of alternatives, coupled with our robust, public NEPA and application review process, will ensure that any and all reasonable alternatives receive full consideration.

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[28] In natural gas pipeline proceedings, the Commission also regularly explores not only major route alternatives, but also various minor route variations that reduce the impact of the proposed facility. It is not unlikely that in an electric transmission proceeding the Commission, on a case-by-case basis, would analyze similar variations of a proposed facility.

3. Socioeconomic Impacts

63. In the NOPR, the Commission proposed that the applicant would be required to conduct a property value impact analysis for the proposed transmission line for properties adjacent to or abutting the right-of-way of proposed transmission lines. In the Final Rule, the Commission determined that given the speculative nature of these analyses and the time and resources the applicant would need to dedicate towards completion of this study, the Commission did not believe such a requirement is consistent with the purpose of EPAct 2005. The Commission stated that it will consider such information when provided in making a determination on the project, but such information will not be required.[29]

64. On rehearing, CARI asserts that the Commission erred by deleting the property value impact analysis from the Final Rule. It contends that NEPA and its implementing regulations require an evaluation of all socioeconomic impacts where they are interrelated with the project's impacts to the physical environment, regardless of whether such analysis causes delay or whether there are various methodologies for such analysis. Further, it states that to the extent socioeconomic impacts are interrelated with natural or physical environmental impacts, the agency must make reasonable efforts to acquire relevant information concerning such

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[29] Id. at P 158

impacts.[30] CARI asserts that by removing the property value impact analysis from its new regulations, the Commission violates both the letter and spirit of NEPA and its implementing CEQ regulations.

65. CARI also contends that the Commission erred by failing to require evaluation of the rate impact on consumers as a cognizable socioeconomic impact. It argues that as part of the socioeconomic impact analysis, the Commission is required to evaluate the effect of the proposed project and the alternatives on the cost of electricity to consumers.

66. Under NEPA "an agency must make reasonable efforts to acquire relevant information concerning socioeconomic impacts, when economic or social and natural or physical environmental effects are interrelated."[31] NEPA does not require that an agency:

> examine the economic consequences of its actions. The theme of § 102 [of NEPA] is sounded by the adjective "environmental": NEPA does not require the agency to assess every impact or effect of its proposed action, but only the

[30]Citing Tongass Conservation Society v. Cheney, 924 F.2d 1137, 1144 (D.C. Cir. 1991).

[31]Id. (finding that the Navy's consideration of socioeconomic impacts was not inadequate for failure to prepare a survey conducted over several months of visitors, tourists, and other traveling to the areas for recreational fishing or other activities).

> impact or effect on the environment. If we were to seize the word "environmental" out of its context and give it the broadest possible definition, the words "adverse environmental effects" might embrace virtually any consequence . . . that some one thought "adverse."[32]

67. While the Commission excluded the property value analysis as a filing requirement from the Final Rule, it did not specifically foreclose such an analysis from its socioeconomic impact analysis. The Commission will address all issues raised in a request for a permit on a case-by-case basis. Further, cost recovery and the effect on customer rates is purely an economic issue that is not part of the Commission's NEPA review of a proposed project. Recovery of costs associated with a particular transmission project will be addressed by the Commission or other ratemaking authorities as appropriate.

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[32]Association of Pub. Agency Customers v. Bonneville Power Admin., 126 F.3d 1158, at 1186 (9th Cir. 1997), citing Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983). See also, Montana v. United States EPA, 137 F.3d 1135, 1142(9th Cir. 1998)(finding that even if the tribal water quality standards program might affect property values, such a speculative and purely economic interest does not create a protectable interest in litigation concerning a statute that regulates environmental, not economic, interest); Portland Audubon Soc'y v. Hodel, 886 F.2d 302, 302 (9th Cir. 1989)(finding that an adverse economic impact does not create a significant protectable interest in litigation under NEPA).

4. Environmental Analysis of Final Rule

68. The Commission stated that no environmental consideration is raised by the promulgation of a rule that is procedural in nature or does not substantially change the effect of legislation or regulations being amended. The proposed regulations implement the procedural notice and filing requirements for applications to construct electric transmission facilities. Therefore, the Commission determined that an Environmental Assessment or EIS was not required.

69. On rehearing, CARI contends that the Final Rule implemented substantive revisions to the Commission's NEPA regulations that may directly impact the environment. It claims that the Commission has restricted project alternatives and impacts to be evaluated for proposed transmission facilities that may be built in national corridors. It argues that the restrictions on the range of information to be evaluated is not merely a matter of procedure, but rather affects the substance of the NEPA analysis. CARI claims that the mere fact that an environmental review may also take place at a later time, such as when a particular project is proposed, does not preclude an environmental review at the time a regulation is promulgated.[33]

[33]See CARI's rehearing request at 32, citing Sierra Club v. United States, 255 F.Supp 2d 1177, 1186 (D.Colo. 2002)and Scientists' Institute for Public Information v. Atomic Energy Comm'n, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973).

70. The cases cited by CARI both address situations where there was a project with ground disturbance. The Commission did not restrict the alternatives or impacts that it will look at in an environmental analysis of each proposed project. It simply listed minimum filing requirements and will, in fact, do a complete analysis for every proposed project. The Final Rule does not authorize any construction of facilities that will cause ground disturbance and thus, no environmental analysis is required.

5. CEQ Consultation

71. CARI argues that CEQ regulations require that the Commission first consult with the CEQ so that it may review the proposed revisions for compliance with NEPA.[34] They assert that there is no indication in the NOPR or the Final Rule that the Commission has consulted with the CEQ to determine whether the revisions comply with NEPA. It contends that in the absence of such consultation with the CEQ, the

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[34]40 C.F.R. § 1507.3 ("[E]ach agency shall as necessary adopt procedures to supplement these regulations. . . . Each agency shall consult with the Council while developing its procedures and before publishing them in the Federal Register for comment. . . . The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. . . . Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.").

Commission's issuance of the Final Rule, in which it revised its NEPA implementing requirements, is unlawful and the regulations must be withdrawn or stayed until the required consultation occurs.

72. Section 1507.3 of CEQ's regulations generally pertains to consultations with CEQ when agencies develop their initial NEPA regulations. Here, where we are developing regulations to implement EPAct 2005, not NEPA, consultation with CEQ is not necessary. Moreover, CEQ signed the MOU establishing a framework for early coordination of all applicable federal authorizations relating to the siting of transmission facilities and we will continue to work with CEQ and other agencies where appropriate.

The Commission orders:

All requests for rehearing are denied.

By the Commission.

Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY
COMMISSION

Regulations for Filing Applications for Permits
to Site Interstate Electric Transmission Facilities

Docket No. RM06-12-001

(May 17, 2007)

KELLY, Commissioner, dissenting in part:

My dissent from the underlying order in this proceeding explains why I believe the majority's finding that "withheld approval for more than one year" includes a state's lawful denial of a permit flies in the face of the plain language of section 216 of EPAct 2005. On rehearing, the parties also cite to the plain language in challenging the majority's interpretation, yet the majority responds, without more, that it finds "the parties' arguments unpersuasive." The majority does note that the parties' argument "ignores the fact that the term as used in the EPAct 2005 is inclusive, comprising 'denying' approval as well as 'refraining' or 'holding back' from granting approval." In my view, such circular reasoning—"we say it is so therefore it must be so"—is simply not reasoned decisionmaking.

To shore up its interpretation, the majority makes much of what it deems to be the underlying purpose of section 216, that is, "to facilitate the process

of siting critical regional transmission lines and facilities, ensuring adequate capacity and increased reliability on the electric transmission grid." Nothwithstanding that the majority cites as the basis for this statutory purpose a speech given by a congressional representative four months before the passage of EPAct 2005, the majority in any event fails to demonstrate how pre-empting states when they lawfully deny permits will further this asserted purpose. As I noted in my previous dissent, I believe that states, as well as applicants, will act in good faith in processing requests for permits. Indeed, given the consequences of unlawfully denying a permit application, states would have a significant incentive to act in good faith in processing them, which, I am confident, would ultimately result in a more efficient and effective state transmission siting process.

It is not reasonable to conclude that Congress's intent in enacting section 216 was to ensure the construction of transmission lines at the expense of a thoughtful, timely, and reasoned state determination, even where such a determination is the denial of a permit. As I noted in my previous dissent, states have always had exclusive, plenary jurisdiction over transmission siting, and the plain language of section 216 affirms the states' important role by carefully carving out only a limited role for the federal government in the area of transmission citing.[1]

[1]As one of the parties in this proceeding notes, support for such a limited role is bolstered by, e.g., S. Rep. No. 109-078, at 48 (2005)(explaining that section 216 "provides limited federal backstop siting authority...for electric transmission lines").

The majority has not cited any additional legislative intent to pre-empt states from lawfully denying permit applications; in fact, the majority rightly acknowledges that there is no "definitive legislative history on point." The majority does try and bolster its interpretation by comparing the statutory language at issue to that of new FPA section 203(a)(5), however, I agree with petitioners that such comparison offers no support, because, as the majority also acknowledges, sections 203 and 216 address different regulatory situations.

When all is said and done, the majority has failed to demonstrate that Congress intended to pre-empt the states when they lawfully deny permit applications. It cites New York v. FERC for the proposition that in the instant case, there should be no "presumption against pre-emption" because there is no conflicting state law or regulations but, rather, there is a question over "the scope of the authority granted the Commission in section 216 to act in certain circumstances." However, New York v. FERC involved clear statutory language under the Federal Power Act that "unambiguously" and with no "limitation" authorizes the Commission to assert jurisdiction over interstate electricity transmissions.[2] Such sweeping pre-emptive authority is not the case here.

Even assuming, arguendo, that, as the majority asserts, there should be no presumption against

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[2]New York v. FERC, 535 U.S. 1 (2002).

preemption, the majority fails to address the fact that a court will not find federal pre-emption "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[3] Instead, the majority concludes that it has "substantial textual and contextual support" for its "reasonable" interpretation, and that "if Congress had intended to limit the scope of its grant of authority in instances where a state has denied an application, it would have explicitly done so." The majority's reasoning is backward and fails to meet the high burden established by the courts.

Finally, I am troubled by the majority's dismissive attitude toward the parties' challenges over the determination that "withheld approval" can reasonably be interpreted to include a state's lawful denial of a permit application. In noting that "agencies from only two states" question the Commission's jurisdictional finding, and that "NARUC did not seek rehearing," the majority implies that the legitimacy of a challenge is determined by the number of challengers and by whom the challengers are. This is anathema to the way the Commission should conduct business, that is, by determining the legitimacy of a challenge based solely on its merits. Yet, in this order,

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[3]Id. at 18 (court has "to be certain that Congress has conferred authority on the agency" when controversy concerns scope of federal authority to preempt state law); See also Gregory v. Ashcroft, 501 U.S 452 (1991) (for a court to find federal pre-emption, it must be "unmistakably clear" that Congress intended to do so).

the majority suggests that the parties may not be "significant enough" to warrant meaningful consideration of the merits of their challenges. It no doubt states the obvious to note that entities choose to file, or not to file, challenges to Commission findings based on any number of factors, such as financial resources, internal or external political pressures, or understanding of Commission proceedings.

For all of the reasons stated above, as well as those set forth in my November 16, 2006 statement in this proceeding, I respectfully dissent.

Suedeen G. Kelly

APPENDIX E

16 U.S.C. 824p provides:

SITING OF INTERSTATE ELECTRIC TRANSMISSION FACILITIES.

(a) IN GENERAL.—Part II of the Federal Power Act (16 U.S.C. 824 et seq.) is amended by adding at the end the following:

SEC. 216. SITING OF INTERSTATE ELECTRIC TRANSMISSION FACILITIES.

(a) DESIGNATION OF NATIONAL INTEREST ELECTRIC TRANSMISSION CORRIDORS.—(1) Not later than 1 year after the date of enactment of this section and every 3 years thereafter, the Secretary of Energy (referred to in this section as the 'Secretary'), in consultation with affected States, shall conduct a study of electric transmission congestion.

(2) After considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States), the Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.

(3) The Secretary shall conduct the study and issue the report in consultation with any appropriate

regional entity referred to in section 215.

(4) In determining whether to designate a national interest electric transmission corridor under paragraph (2), the Secretary may consider whether—

(A) the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;

(B)(i) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and

(ii) a diversification of supply is warranted;

(C) the energy independence of the United States would be served by the designation;

(D) the designation would be in the interest of national energy policy; and

(E) the designation would enhance national defense and homeland security.

(b) CONSTRUCTION PERMIT.—Except as provided in subsection (i), the Commission may, after notice and an opportunity for hearing, issue one or more permits for the construction or modification of

electric transmission facilities in a national interest electric transmission corridor designated by the Secretary under subsection (a) if the Commission finds that—

(1)(A) a State in which the transmission facilities are to be constructed or modified does not have authority to—

(i) approve the siting of the facilities; or

(ii) consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

(B) the applicant for a permit is a transmitting utility under this Act but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or

(C) a State commission or other entity that has authority to approve the siting of the facilities has—

(i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric

transmission corridor, whichever is later; or

(ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible;

(2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;

(3) the proposed construction or modification is consistent with the public interest;

(4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;

(5) the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and

(6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.

(c) PERMIT APPLICATIONS.—(1) Permit applications under subsection (b) shall be made in writing to the Commission.

(2) The Commission shall issue rules specifying—

(A) the form of the application;

(B) the information to be contained in the application; and

(C) the manner of service of notice of the permit application on interested persons.

(d) COMMENTS.—In any proceeding before the Commission under subsection (b), the Commission shall afford each State in which a transmission facility covered by the permit is or will be located, each affected Federal agency and Indian tribe, private property owners, and other interested persons, a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit.

(e) RIGHTS-OF-WAY.—(1) In the case of a permit under subsection (b) for electric transmission facilities to be located on property other than property owned by the United States or a State, if the permit holder cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct or

modify the transmission facilities, the permit holder may acquire the rightof- way by the exercise of the right of eminent domain in the district court of the United States for the district in which the property concerned is located, or in the appropriate court of the State in which the property is located.

(2) Any right-of-way acquired under paragraph (1) shall be used exclusively for the construction or modification of electric transmission facilities within a reasonable period of time after the acquisition.

(3) The practice and procedure in any action or proceeding under this subsection in the district court of the United States shall conform as nearly as practicable to the practice and procedure in a similar action or proceeding in the courts of the State in which the property is located.

(4) Nothing in this subsection shall be construed to authorize the use of eminent domain to acquire a right-of-way for any purpose other than the construction, modification, operation, or maintenance of electric transmission facilities and related facilities. The rightof- way cannot be used for any other purpose, and the right-ofway shall terminate upon the termination of the use for which the right-of-way was acquired.

(f) COMPENSATION.—(1) Any right-of-way acquired pursuant to subsection (e) shall be considered a taking of private property for which just compensation is due.

(2) Just compensation shall be an amount equal to the fair market value (including applicable severance damages) of the property taken on the date of the exercise of eminent domain authority.

(g) STATE LAW.—Nothing in this section precludes any person from constructing or modifying any transmission facility in accordance with State law.

(h) COORDINATION OF FEDERAL AUTHORIZATIONS FOR TRANSMISSION FACILITIES.—(1) In this subsection:

(A) The term 'Federal authorization' means any authorization required under Federal law in order to site a transmission facility.

(B) The term 'Federal authorization' includes such permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law in order to site a transmission facility.

(2) The Department of Energy shall act as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of the facility.

(3) To the maximum extent practicable under applicable Federal law, the Secretary shall coordinate the Federal authorization and review process under this subsection with any Indian tribes, multistate

entities, and State agencies that are responsible for conducting any separate permitting and environmental reviews of the facility, to ensure timely and efficient review and permit decisions.

(4)(A) As head of the lead agency, the Secretary, in consultation with agencies responsible for Federal authorizations and, as appropriate, with Indian tribes, multistate entities, and State agencies that are willing to coordinate their own separate permitting and environmental reviews with the Federal authorization and environmental reviews, shall establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facility.

(B) The Secretary shall ensure that, once an application has been submitted with such data as the Secretary considers necessary, all permit decisions and related environmental reviews under all applicable Federal laws shall be completed—

(i) within 1 year; or

(ii) if a requirement of another provision of Federal law does not permit compliance with clause (i), as soon thereafter as is practicable.

(C) The Secretary shall provide an expeditious pre-application mechanism for prospective applicants to confer with the agencies involved to have each such agency determine and communicate to the prospective applicant not later than 60 days after the prospective

applicant submits a request for such information concerning—

(i) the likelihood of approval for a potential facility; and

(ii) key issues of concern to the agencies and public.

(5)(A) As lead agency head, the Secretary, in consultation with the affected agencies, shall prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law.

(B) The Secretary and the heads of other agencies shall streamline the review and permitting of transmission within corridors designated under section 503 of the Federal Land Policy and Management Act (43 U.S.C. 1763) by fully taking into account prior analyses and decisions relating to the corridors.

(C) The document shall include consideration by the relevant agencies of any applicable criteria or other matters as required under applicable law.

(6)(A) If any agency has denied a Federal authorization required for a transmission facility, or has failed to act by the deadline established by the Secretary pursuant to this section for deciding whether to issue the authorization, the applicant or any State in which the facility would be located may file an

appeal with the President, who shall, in consultation with the affected agency, review the denial or failure to take action on the pending application.

(B) Based on the overall record and in consultation with the affected agency, the President may—

(i) issue the necessary authorization with any appropriate conditions; or

(ii) deny the application.

(C) The President shall issue a decision not later than 90 days after the date of the filing of the appeal.

(D) In making a decision under this paragraph, the President shall comply with applicable requirements of Federal law, including any requirements of—

(i) the National Forest Management Act of 1976 (16 U.S.C. 472a et seq.);

(ii) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);

(iii) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

(iv) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(v) the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).

(7)(A) Not later than 18 months after the date of enactment of this section, the Secretary shall issue any regulations necessary to implement this subsection.

(B)(i) Not later than 1 year after the date of enactment of this section, the Secretary and the heads of all Federal agencies with authority to issue Federal authorizations shall enter into a memorandum of understanding to ensure the timely and coordinated review and permitting of electricity transmission facilities.

(ii) Interested Indian tribes, multistate entities, and State agencies may enter the memorandum of understanding.

(C) The head of each Federal agency with authority to issue a Federal authorization shall designate a senior official responsible for, and dedicate sufficient other staff and resources to ensure, full implementation of the regulations and memorandum required under this paragraph.

(8)(A) Each Federal land use authorization for an electricity transmission facility shall be issued—

(i) for a duration, as determined by the Secretary, commensurate with the anticipated use of the facility; and

(ii) with appropriate authority to manage the right-of-way for reliability and environmental protection.

(B) On the expiration of the authorization (including an authorization issued before the date of enactment of this section), the authorization shall be reviewed for renewal taking fully into account reliance on such electricity infrastructure, recognizing the importance of the authorization for public health, safety, and economic welfare and as a legitimate use of Federal land.

(9) In exercising the responsibilities under this section, the Secretary shall consult regularly with—

(A) the Federal Energy Regulatory Commission;

(B) electric reliability organizations (including related regional entities) approved by the Commission; and

(C) Transmission Organizations approved by the Commission.

(i) INTERSTATE COMPACTS.—(1) The consent of Congress is given for three or more contiguous States to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to—

(A) facilitate siting of future electric

energy transmission facilities within those States; and

(B) carry out the electric energy transmission siting responsibilities of those States.

(2) The Secretary may provide technical assistance to regional transmission siting agencies established under this subsection.

(3) The regional transmission siting agencies shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States).

(4) The Commission shall have no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement and the Secretary makes, after notice and an opportunity for a hearing, the finding described in subsection (b)(1)(C).

(j) RELATIONSHIP TO OTHER LAWS.—(1) Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Subsection (h)(6) shall not apply to any unit

of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Trails System, the National Wilderness Preservation System, or a National Monument.

(k) ERCOT.—This section shall not apply within the area referred to in section 212(k)(2)(A).

(b) REPORTS TO CONGRESS ON CORRIDORS AND RIGHTS-OF-WAY ON FEDERAL LANDS.—Not later than 90 days after the date of enactment of this Act, the Secretary of the Interior, the Secretary, the Secretary of Agriculture, and the Chairman of the Council on Environmental Quality shall submit to Congress a joint report identifying—

(1)(A) all existing designated transmission and distribution corridors on Federal land and the status of work related to proposed transmission and distribution corridor designations under title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761 et seq.);

(B) the schedule for completing the work;

(C) any impediments to completing the work; and

(D) steps that Congress could take to expedite the process;

(2)(A) the number of pending applications to locate transmission facilities on Federal land;

(B) key information relating to each such facility;

(C) how long each application has been pending;

(D) the schedule for issuing a timely decision as to each facility; and

(E) progress in incorporating existing and new such rights-of-way into relevant land use and resource management plans or the equivalent of those plans; and

(3)(A) the number of existing transmission and distribution rights-of-way on Federal land that will come up for renewal within the following 5-, 10-, and 15-year periods; and

(B) a description of how the Secretaries plan to manage the renewals.

APPENDIX F

18 C.F.R. 50.6 provides:

Applications: general content.

Each application filed under this part must provide the following information:

(a) The exact legal name of applicant; its principal place of business; whether the applicant is an individual, partnership, corporation, or otherwise; the State laws under which the applicant is organized or authorized; and the name, title, and mailing address of the person or persons to whom communications concerning the application are to be addressed.

(b) A concise description of applicant's existing operations.

(c) A concise general description of the proposed project sufficient to explain its scope and purpose. The description must, at a minimum: Describe the proposed geographic location of the principal project features and the planned routing of the transmission line; contain the general characteristics of the transmission line including voltage, types of towers, origin and termination points of the transmission line, and the geographic character of area traversed by the line; and be accompanied by an overview map of sufficient scale to show the entire transmission route on one or a few 8.5 by 11-inch sheets.

(d) Verification that the proposed route lies within a national interest electric transmission corridor designated by the Secretary of the Department of Energy under section 216 of the Federal Power Act.

(e) Evidence that:

(1) A State in which the transmission facilities are to be constructed or modified does not have the authority to approve the siting of the facilities or consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

(2) The applicant is a transmitting utility but does not qualify to apply for a permit or siting approval of the proposed project in a State because the applicant does not serve end-use customers in the State; or

(3) A State commission or other entity that has the authority to approve the siting of the facilities has:

(i) Withheld approval for more than one year after the filing of an application seeking approval under applicable law or one year after the designation of the relevant national interest electric transmission corridor, whichever is later; or

(ii) Conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.

(f) A demonstration that the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce, and that the proposed construction or modification:

(1) Is consistent with the public interest;

(2) Will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;

(3) Is consistent with sound national energy policy and will enhance energy interdependence; and

(4) Will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.

(g) A description of the proposed construction and operation of the facilities, including the proposed dates for the beginning and completion of construction and the commencement of service.

(h) A general description of project financing.

(i) A full statement as to whether any other application to supplement or effectuate the applicant's proposals must be or is to be filed by the applicant, any of the applicant's customers, or any other person, with any other Federal, State, Tribal, or other regulatory body; and if so, the nature and status of each such application.

(j) A table of contents that must list all exhibits and documents filed in compliance with this part, as well as all other documents and exhibits otherwise filed, identifying them by their appropriate titles and alphabetical letter designations. The alphabetical letter designations specified in §50.7 must be strictly adhered to and extra exhibits submitted at the volition of applicant must be designated in sequence under the letter Z (Z1, Z2, Z3, etc.).

(k) A form of notice suitable for publication in the Federal Register, as provided by §50.9(a), which will briefly summarize the facts contained in the application in such a way as to acquaint the public with its scope and purpose. The form of notice also must include the name, address, and telephone number of an authorized contact person.

Supreme Court, U.S.
FILED
OCT 2 1 2009
OFFICE OF THE CLERK

No. 09-343

In The
Supreme Court of the United States

EDISON ELECTRIC INSTITUTE, ET AL.,
Petitioners,

v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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LIST OF PARTIES

Petitioners:

Edison Electric Institute; American Public Power Association; National Rural Electric Cooperative Association; American Wind Energy Association; Allegheny Power; Trans-Allegheny Interstate Line Co.; and San Diego Gas & Electric Co.

Respondents:

Piedmont Environmental Council; Public Service Commission of the State of New York; and Minnesota Public Utilities Commission;

Federal Energy Regulatory Commission;

Communities Against Regional Interconnect

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. Rule 29.6, Respondents state as follows:

As State entities, the People of the State of New York, the Public Service Commission of the State of New York, and the Minnesota Public Utilities Commission, are not required to file a disclosure statement under Rule 29.6.

Piedmont Environmental Council is not a publicly held corporation or entity and has no parent corporations. Piedmont Environmental Council is not a trade association.

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COUNTER-STATEMENT OF THE CASE

Authority to approve or deny a permit for the construction of electric transmission facilities has traditionally been exclusively reserved to the States, in large part because the construction of such facilities directly implicates compelling State interests concerning, among other things, land-use, environmental impacts, energy planning, and use of State resources. In 1935, Congress enacted the Federal Power Act (FPA) as part of a legislative scheme under which the Federal government regulated electric transmission and sales of electric energy for resale in interstate commerce, while States retained control over local matters, including siting of transmission lines and generating plants. *New York v. FERC*, 535 U.S. 1, 24 (2002).

In 2005, for the first time, Congress granted the Federal Energy Regulatory Commission (FERC) carefully limited "backstop" jurisdiction over the siting of electric transmission facilities when it enacted a new Section 216 of the FPA.[1] Section 216 allows FERC to grant siting permits in five very specific circumstances. *See, generally,* 16 U.S.C. §824*p*(b). One such circumstance – which is the focus of this case – is when a State having legal authority to site a proposed line and consider its interstate benefits, has "withheld approval for more than 1 year after the filing of an application" for a siting permit. *Id.* at §824*p*(b)(1)(C)(i).

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[1] Energy Policy Act of 2005 (EPAct 2005), Title XII, Pub. L. No. 109-58, 119 Stat. 594 (2005) (adding new §216 to the FPA, codified at 16 U.S.C. §824*p*).

In the broader context of EPAct 2005, transmission line siting is only one element among many in Congress' multifaceted energy policy reform.[2] As the Senate stated, "[t]he purpose of the measure is to provide a comprehensive national energy policy that balances domestic energy production with conservation and efficiency efforts to enhance the security of the United States and decrease dependence on foreign sources of fuel." S. Rep. No. 109-78, at 1 (2005). The scope of EPAct 2005 is broad and covers numerous topics including, *e.g.*, energy efficiency, renewable energy resources, natural gas storage, clean coal technology, and alternative fuels for vehicles, to name a few. *See* EPAct 2005 §1, "Table of Contents."

To the extent Congress addressed transmission siting, it granted FERC its limited "backstop" siting authority when, generally speaking, a State either cannot act, or has failed to act in a timely manner. In deference to States' traditional authority over transmission siting, Congress confined FERC's new siting jurisdiction to five specific triggering events: 1) when a State lacks authority to approve the siting of transmission facilities; 2) when a State lacks authority to consider the expected interstate benefits of a facility; 3) when an applicant does not qualify for a State permit because it does not serve end users within the State; 4) when a State, having received a permit application, has "withheld approval for more than 1 year;" or 5) when a State conditions its approval such that the project will not significantly reduce

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[2] This is contrary to the impression Petitioners seek to create that streamlined siting and permitting was the sole purpose of the statute. Pet. Br. at 5.

transmission congestion or is not economically feasible. 16 U.S.C. §824*p*(b)(1)(A)-(C).

FERC's backstop siting authority is further confined to geographic areas that the United States Department of Energy (DOE) has designated as a "national interest electric transmission corridor." *Id.* at §824*p*(a)(2), (b). A national interest electric transmission corridor is only an area, designated by the DOE, where transmission congestion adversely affects consumers. According to DOE, moreover, the designation of such a corridor does not indicate that additional transmission facilities are needed.[3]

The particular statutory language at issue in this case, the phrase "withheld approval for more than 1 year," reflects a change that was made to the language of an earlier legislative proposal in order to address concerns that the earlier proposal might have allowed FERC to override every State transmission siting decision. The earlier draft of the bill would have authorized FERC review where a State "has withheld approval, ... or delayed final approval for more than one year". H.R. 6 §16012(b)(1)(B) (as introduced), 149 Cong. Rec. H3130 (Apr. 10, 2003). Commenting on this initial draft, Representative Henry E. Brown, Jr. observed that "the transmission siting provision ... seems to make FERC look more like a Court of

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[3] In DOE's words, "a National Corridor designation does not constitute a finding that transmission must or even should be built; it does not prejudice State or Federal siting processes against non-transmission solutions; and it should not discourage market participants from pursuing such solutions." USDOE, *National Electric Transmission Congestion Report*, 72 Fed. Reg. 56,992, 57,012 (Oct. 5, 2007) (emphasis added).

Appeals for energy companies dissatisfied with State decisions, than a true backstop[,]" and that "the potential for FERC review for every siting decision seems a step backward." *Comprehensive Nat'l Energy Policy: Hearings Before the Subcomm. on Energy and Air Quality of the Comm. on Energy and Commerce*, 108th Cong. 13 (2003). Likewise, Representative Rick Boucher expressed concern that the initial draft bill "would give the FERC preemptive authority over the siting of transmission lines[,]" stating that he had "heard no evidence that would justify removing the ultimate decision over this new siting from the States to the Federal level." *Id.* at 297.

Importantly, the language of Section 216, as finally enacted, eliminated the two separate jurisdictional triggers – "withheld approval" or "delayed final approval for more than one year" – and replaced them with the single trigger of "withheld approval for more than 1 year." H.R. Rep. No. 108-375 at 264 (2003). FERC's then-Chairman Pat Wood, III, explained that FERC's understanding was that this single trigger would confer limited authority upon the agency:

> So the States are still in the driver's seat. It is only when they cannot act, or they are prohibited by their law from acting, or they choose not to act, that it comes to the Federal Government .... .

Keeping the Lights On: The Federal Role in Managing the Nation's Elec.: Hearing Before the Oversight of Gov't Mgmt., the Federal Workforce and the Dist. of Columbia Subcomm. of the S. Comm. on Governmental Affairs, S. Hrg. 108-277, 108th Cong. 50 (2003). Although the Senate later failed to agree to the

Conference Report, the single trigger was enacted into Section 1221 of EPAct 2005, and became part of new Section 216 of the FPA.

In its Notice of Proposed Rulemaking to enact rules implementing Section 216, FERC did not indicate that it would interpret the phrase "withheld approval for more than 1 year" to include a State's denial of a siting application within one year. *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors*, 71 Fed. Reg. 36,258 (proposed June 16, 2006). Nor was this interpretation suggested by any of the 51 comments FERC received in response to its Notice of Proposed Rulemaking.

Nonetheless, a majority of FERC commissioners adopted this interpretation in the preamble to FERC's final regulation. *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 71 Fed. Reg. 69,440, 69,444 ¶26 (Nov. 16, 2006) (Order No. 689); Pet. App. at 70a. FERC's interpretation, however, was not promulgated as part of its regulation, which generally adopted the language of Section 216, and merely repeated the phrase "withheld approval for more than one year." 18 C.F.R. §50.6(e)(3)(i).[4] The majority reaffirmed their

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[4] Prior to issuing Order 689, FERC did not contend it had authority to preempt state siting decisions. A statement issued by then-FERC Chair Joseph Kelliher instead said the new law gave FERC "a carefully limited role that supplements state authorities rather than supplanting them." Statement of FERC Chair Joseph T. Kelliher, *Electric Grid and Summer Heat, House Government Reform Committee-Subcommittee on Energy and Resources Hearing* at 8, *available at* http://www.ferc.gov/eventcalendar/files/20060712145318-Kelliher-test-07-12-06.pdf

interpretation on rehearing. *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 119 F.E.R.C. ¶61,154, at ¶¶11, 15, 17, 19 (May 17, 2007) (rehearing order). Pet. App. at 252a, 254a-55a, 256a-57a, 258a.

Notably, FERC's view of the statute was not unanimous. Commissioner Suedeen G. Kelly strongly dissented. Order No. 689, 71 Fed. Reg. at 69,476; Pet. App. at 240a. Commissioner Kelly stated it was "nonsensical" to read the statute as the majority did, because it would render the phrase "for more than one year" superfluous. Order No. 689, 71 Fed. Reg. at 69,476; Pet. App. at 242a. Commissioner Kelly also observed that it "defies common sense to insert the concept of 'reject' or 'deny' into [the statutory phrase] 'withheld approval for more than 1 year after the filing of an application.'" Order No. 689, 71 Fed. Reg. at 69,476; Pet. App. at 241a.

Piedmont Environmental Council (Piedmont), the Public Service Commission of the State of New York (NYPSC), the Minnesota Public Utilities Commission (Minn. PUC) and Communities Against Regional Interconnect (CARI) timely petitioned for review of FERC's orders, pursuant to 16 U.S.C. §825*l*(b). Because the first of these four petitions was filed in the

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(July 12, 2006). Then-Chairman Kelliher also said that Section 216 "do[es] not preempt the states" but instead provides "a federal siting process [that] supplements a state siting process" Statement of Joseph T. Kelliher, Chairman of FERC, Regulations for Filing Applications for Permits to Site Transmission Facilities, FERC Docket No. RM06-12-000 (June 15, 2006), *available at http://www.ferc.gov/news/statements-speeches/kelliher/2006/06-15-06-kelliher-C-1.asp*.

Fourth Circuit, the other three petitions were transferred to that court, pursuant to 28 U.S.C. §2112(a)(1),(5), and the cases were consolidated there. Pet. App. at 15a.

Deciding the case at Step One of the framework adopted by this Court in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), a majority of the Fourth Circuit panel held that the word "withheld," in the particular context of the phrase "withheld approval for more than 1 year," and in the larger context of the statute, plainly is not synonymous with "denied." *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 313 (4th Cir. 2009). Pet. App. at 17a-18a. First, with respect to the particular context, it observed that the phrase "withheld approval" within the larger phrase "withheld approval for more than 1 year" expressly pertains to a State's continually recurring failure to act on an application throughout an ongoing period of one year, but does not pertain to the instantaneous act of denial. *Id.*. Thus, the Fourth Circuit found that FERC's attempt to conflate "denied" and "withheld" would render the entire phrase "withheld approval for more than 1 year" nonsensical. 558 F.3d at 313; Pet. App. at 18a. ("FERC's word substitution ... renders the entire phrase nonsensical ...."). *Id.*

The panel further concluded the broader context, namely Section 216(b)(1) as a whole, confirmed that the phrase "withheld approval for more than 1 year" does not encompass a denial of a permit within one year. *Piedmont*, 558 F.3d at 314; Pet App. at 19a-21a. The Fourth Circuit reasoned that Section 216(b)(1), 16 U.S.C. §824*p*(b)(1), "provides a carefully drawn list of five circumstances" under which FERC "may preempt

a state ...." 558 F.3d at 313; Pet. App. at 19a. It decided that, "[w]hen the five circumstances in §216(b)(1) are considered together, they indicate that Congress intended only a measured, although important, transfer of jurisdiction to FERC." *Piedmont*, 558 F.3d at 314; Pet App. at 20a. The Fourth Circuit observed that reading "withheld approval" to include denial of a permit would "render[] it completely out of proportion with the four other jurisdiction-granting circumstances[,]" and "would mean that Congress has told state commissions that they will lose jurisdiction unless they approve every permit application in a national interest corridor." *Id.* This, it found, was contrary to the limited authority Congress gave FERC, because it would make it "futile for a state commission to deny a permit based on traditional considerations like cost and benefit, land use and environmental impacts, and health and safety." *Id.* The Fourth Circuit reasoned that "if Congress intended to take the monumental step of preempting state jurisdiction *every time* a state commission denies a permit in a national interest corridor, it would surely have said so directly." *Piedmont*, 558 F.3d at 314; Pet. App. at 21a (emphasis in original). Consequently, it reversed FERC's interpretation. The Fourth Circuit concluded that Congress did not intend to authorize FERC to act where a State has committed the final administrative act of denying an application for a siting permit within one year. *Piedmont*, 558 F.3d at 314; Pet. App. at 22a-23a.

Judge Traxler dissented, opining that the phrase "withheld approval" also applies to State denials. *Piedmont*, 558 F.3d at 322-23; Pet. App. at 41a-42a. Judge Traxler relied heavily on FPA §216(b)(1)(C)(ii)

which authorizes FERC review when a State has "conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible." 16 U.S.C. §824*p*(b)(1)(C)(ii). Judge Traxler concluded it was nonsensical for Congress to have allowed FERC to review permit conditions, but not permit denials. *Piedmont*, 558 F.3d at 323-24; Pet. App. at 43a-44a. He found further support in, *inter alia*, the legislative history. *Piedmont*, 558 F.3d at 324; Pet. App. at 46a-48a.

The Fourth Circuit denied rehearing after the panel failed to request that the judges be polled. *Piedmont Envtl. Council v. FERC*, No. 07-1651 (4th Cir. Apr.20, 2009); Pet. App. at 51a.

FERC has not petitioned this Court for a writ of certiorari to the Fourth Circuit. Rather, only the various electric power industry intervenors, who intervened in the Fourth Circuit proceeding in support of FERC, now seek certiorari.

REASONS FOR DENYING A WRIT OF CERTIORARI

This is an unremarkable case applying Step One of the familiar *Chevron* standard of review to FERC's construction of the statutory phrase "withheld approval for more than 1 year" in light of its context and the purpose of EPAct 2005 §1221. Because the Fourth Circuit simply applied traditional principles of statutory construction to comprehend the relevant provision's plain meaning, this case does not present an important question of Federal law. There is no

compelling reason, therefore, to grant a writ of certiorari.

The Fourth Circuit correctly construed the statute. That Court properly concluded that, in its specific context, the word "withheld" cannot be equated to "denied." It correctly understood that a "withholding" of approval is continuous, while a "denial" is instantaneous, and stops the running of time during which approval was being withheld. Likewise, the Fourth Circuit recognized that FERC's equating of "withheld" and "denied" reads the words "for more than 1 year" out of the statute. And, in the broader context of §1221, the Fourth Circuit properly concluded that Congress intended to provide FERC with measured, limited backstop siting authority, in recognition of Congress' careful balancing of national transmission reliability interests against States' traditional authority in the area of land use regulation.

In the Fourth Circuit's opinion, the dissent incorrectly imputed into the statute a purpose of authorizing FERC to site transmission lines whenever the State process does not generate either an outright permit grant or a minimally conditioned one. Consistent with this misapprehension, the dissent failed to recognize that State approval can only be "withheld" while an application is pending. Likewise, the dissent failed to appreciate why Congress intended to authorize FERC siting in the event of a State grant with conditions that may frustrate Federal interests in relieving transmission congestion, but not necessarily whenever a State has lawfully denied a permit. State denials are subject to review in State courts and, by preserving the primary State role, Congress recognized that State courts are capable of reviewing the

lawfulness and reasonableness of a State permit denial. Conversely, when a State agency imposes conditions interfering with the ability of a proposed line to relieve interstate congestion or rendering a proposed line uneconomic, Congress authorized a limited Federal intrusion upon State jurisdiction. Such circumstances raise questions relating more directly to federal interests, and potentially triggering FERC's technical expertise. *See* POINT I. A, *infra*.

Petitioners' argument that a judicial dissent creates "ambiguity" invoking *Chevron* Step Two analysis rests upon a fundamental misunderstanding of *Chevron*. Statutory "ambiguity" under *Chevron* occurs only when Congress has implicitly delegated to an agency authority to resolve the policy question at issue by leaving a statutory gap for the agency to fill. Because judicial disagreement cannot substitute for Congress' intentions, it does not trigger *Chevron* Step Two analysis. *See* POINT I. B, *infra*.

Nothing in the legislative history cited by Petitioners expressly resolves the pertinent question of whether Congress intended to override legitimate State permit denials. *See* POINT II. A, *infra*. Moreover, Petitioners overlook the DOE's findings that transmission economics and market structure present significant transmission development obstacles that may overshadow the siting process. *See* POINT II. B, *infra*. In any event, Congressional policy on electric transmission remains in flux. There is no urgency, therefore, demanding this Court's immediate attention. *See* POINT II. C, *infra*.

Finally, Petitioners incorrectly speculate that siting applications may halt if FERC cannot review State

siting denials. Petitioners offer no basis for assuming State agencies will act inappropriately in considering the interstate benefits of proposed lines or that State courts will not carefully review timely denials to ensure that interstate benefits were properly considered. *See* POINT III, *infra*.

I. THE FOURTH CIRCUIT MAJORITY PROPERLY CONSTRUED THE STATUTE BY EMPLOYING FUNDAMENTAL STATUTORY CONSTRUCTION PRINCIPLES IN A STRAIGHTFORWARD MANNER.

A. This is an unremarkable *Chevron* statutory construction case, which the Fourth Circuit decided correctly.

At issue in this case is whether FERC properly construed the phrase "withheld approval for more than 1 year ...." The Fourth Circuit majority applied Step One of the familiar *Chevron* standard and held that the plain statutory language precluded FERC's interpretation. There is nothing remarkable about the majority's straightforward application of *Chevron*. This case does not involve an "important question of federal law that has not been, but should be, settled by this Court,"[5] Sup. Ct. R. 10(c), and, therefore, it does not present any compelling reason to grant a writ of certiorari.

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[5] Because this case does not involve a conflict between federal and/or state courts, Sup. Ct. R. 10(a), (b), a departure from the accepted and usual course of judicial proceedings, *id.* R. 10(a), or an important federal question decided in a way that conflicts with relevant decisions of this Court, *id.* R. 10(c), this reason is the only potential certiorari ground available to Petitioners.

The Fourth Circuit supported its interpretation of the plain language of the statute, through the straightforward application of principles of statutory construction, in an analysis that fits squarely within Step One of *Chevron*. As this Court has held on numerous occasions, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

1. *The Fourth Circuit majority correctly construed the word "withheld" in its specific context.*

The Fourth Circuit correctly found that the word "withheld" as used in its specific context is not synonymous with "denied." It properly recognized that the phrase "withheld approval for more than 1 year" describes when approval has been continuously held back throughout an ongoing period of one year. *Piedmont*, 558 F.3d at 313; Pet. App. at 17a-18a. The word "withheld" in this context is limited to a continually recurring failure to act throughout a period of one year. The majority also understood the converse – that a denial of an application is a discrete and final action. Thus, a denial "stops the running of time during which approval was withheld." *Id.* The word "withheld," therefore, cannot be equated to the word "denied" in the specific statutory context.

Similarly, the court below recognized that FERC's attempt to substitute "denied" for "withheld" would render the larger phrase "withheld approval for more than 1 year" nonsensical. It explained that "the final

nature of 'denied' conflicts with the continuing nature of '*for* more than one year.'" *Id.* (emphasis in original). A permit denial rendered less than one year after the filing of an application terminates the State agency's application process, and nothing in that process would continue for the remainder of the one-year period. Petitioners accuse the Fourth Circuit of inappropriately substituting "action" for "approval" and therefore not reading the actual words of the statute. Pet. Br. at 16. In so doing, they isolate one sentence in the relevant paragraph, but fail to recognize that the Fourth Circuit considered the entire phrase "withheld approval for more than 1 year." In actuality, the Fourth Circuit concluded that "[t]he continuous act of withholding approval for more than a year cannot include the finite act of denying an application within the one-year deadline." *Piedmont*, 558 F.3d at 313; Pet. App. at 17a. The Court properly attributed to Congress the most natural, common-sense reading of the statute. *United States v. Powell*, 423 U.S. 87, 93 (1975).

2. *The Fourth Circuit majority correctly construed the phrase in its broader statutory context.*

Contrary to claims in the Petition, Pet. Br. at 16-17, the Fourth Circuit correctly construed the statute in its broader context. *Robinson*, 519 U.S. at 341. It properly recognized that Congress intended a measured transfer of jurisdiction in order to ensure that a commission (either a State commission or FERC) is available to make timely decisions on transmission siting applications within National Interest Electric Transmission Corridors. *Piedmont*, 558 F.3d at 314; Pet. App. at 20a. In this manner,

Congress balanced national interests against States' traditional authority in the area of land use regulation, energy planning and the adequacy of utility service. The Fourth Circuit explained that §216(b)(1), as a whole, "provides a carefully drawn list of five circumstances" where FERC jurisdiction over a permit application attaches. *Piedmont*, 558 F.3d at 314; Pet. App. at 19a Those circumstances are when: 1) the State lacks siting authority; 2) the State lacks authority to consider the expected interstate benefits of a proposed line; 3) the applicant does not qualify for a State permit because it does not serve end-user customers; 4) a State commission has "withheld approval for more than 1 year" after the filing of an application, or the designation of a National Interest Electric Transmission Corridor, whichever is later; or 5) a State has imposed conditions that render the line uneconomic or ineffective to reduce significantly transmission congestion. *Piedmont*, 558 F.3d at 314; Pet. App. at 19a.

The four other circumstances — aside from "with[holding] approval for more than 1 year" — pertain to when a State either cannot site the line, or has imposed onerous conditions. *Piedmont*, 558 F.3d at 314; Pet. App. at 20a. Petitioners object to the Court's observation that FERC's interpretation would render it "futile" for the States to do their normal work of reviewing a line. Pet. Br. at 18. Instead, they argue that, even if FERC may issue a permit in any case where a State has not approved a permit within one year, States would retain the ability to decide significant routing and other issues, albeit subject to FERC review. Pet. Br. at 18. But the Fourth Circuit was correct. FERC's interpretation would leave States having siting authority with no choice but to approve

a line, or cede jurisdiction to FERC. FERC's interpretation would thus nullify the important and primary State role that Congress carefully preserved.

Given that the remainder of §216(b)(1) carefully delineates a limited transfer of authority from the States to FERC, the Fourth Circuit correctly recognized that, read as a whole, the statute does not indicate Congress intended "the sweeping transfer of jurisdiction" FERC sought. The Fourth Circuit also noted that, "if Congress had intended to take the monumental step of preempting state jurisdiction *every time* a state commission denies a permit in a national interest corridor, it would surely have said so directly." *Piedmont*, 558 F.3d at 314; Pet. App. at 21a (emphasis in original). The Fourth Circuit's observation is in accord with this Court's decisions regarding the interpretation of statutes involving Congressional balancing of Federal and State power. *See Wyeth v. Levine*, ____ U.S. ____, ____, 129 S. Ct. 1187, 1195 (2009) (noting that, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [the Court] start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (internal quotes omitted)).

3. *The Fourth Circuit dissent misread the statute.*

The reasoning of the FERC majority and the Fourth Circuit dissent (and of Petitioners as well, Pet. Br. at 17) imputes to Congress a broad statutory purpose unsupported by the language Congress

actually employed. The express language of a statute is the most reliable evidence of Congressional intent. *United States v. Turkette*, 452 U.S. 576, 593 (1981). This is because "[f]ederal legislation is often the result of compromise between legislators and 'groups with marked but divergent interests.'" *Wyeth v. Levine*, ____ U.S. ____, ____, 129 S.Ct. 1187, 1215 (2009) (Thomas, J., concurring) (*quoting Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002)). This Court has noted that even under a more liberal statutory construction standard, it is inappropriate "to assume that *whatever* furthers the statute's primary objective must be the law" without textual support. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (*quoting Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original)).

Here, the Fourth Circuit dissent's asserted Congressional objective – to grant FERC jurisdiction over transmission siting whenever a State process does not generate an outright grant or minimally conditioned grant – rests upon an uncertain foundation. For example, Judge Traxler, in describing the context within which Congress enacted Section 216, relied primarily on a pre-enactment statement made by Senator Pete V. Domenici. *Piedmont*, 558 F.3d at 321; Pet. App. at 37a. But the statement of Senator Pete V. Domenici spoke only in general terms about avoiding blackouts, providing limited federal siting authority, and streamlining the siting process to assure adequate transmission. *Id.* It did not address the particular roles of the States and FERC in the siting process, and did not address the language that Congress actually employed.

Although Judge Traxler purported to rely upon the plain meaning of the statutory language, his discussion of the overall "context" within which Congress approved Section 216 indicates that his interpretation was driven not by the particular language and structure of the statute. Instead Judge Traxler's reasoning relies primarily upon a general statutory purpose that he imputed to Congress. In Judge Traxler's words, "[t]he notion that Congress would have been willing to 'trump' states when they thwart the goal of significantly reducing transmission congestion in a national interest [transmission] corridor by granting permits subject to conditions FERC determines to be unreasonable but would not be willing to do so when states thwart the same goal by denying the permits outright makes no sense to me in light of the purpose of the legislation." *Id.* Thus, Judge Traxler's reading of "withheld approval for more than 1 year" was influenced primarily by his view that Congress had a singular purpose of reducing transmission congestion – a purpose he derived in large part from the statement of Senator Pete V. Domenici. *Piedmont*, 558 F.3d at 321; Pet App. at 37a. But if Congress intended such a wholesale transfer of siting jurisdiction to FERC, it could, and would, have expressly said so. Indeed, Congress did so in the Natural Gas Act, with respect to interstate gas transportation facilities. 15 U.S.C. §717f. By first imputing a statutory purpose, and then interpreting the statute in light of that purpose, Judge Traxler misapplied Step One of the *Chevron* analysis. Under *Chevron* Step One, a court must first look to the actual language of the statute, and seek to ascertain its plain meaning based on both its specific and general statutory context.

Moreover, Judge Traxler's dissent (and Petitioners [Pet. Br. at 17]) failed to apprehend key differences between outright State permit denials and State permit grants with conditions that would cause the project to "not significantly reduce transmission congestion in interstate commerce or [not be] economically feasible." 16 U.S.C. §824*p*(b)(1)(C)(ii); *Piedmont*, 558 F.3d at 324; Pet. App. at 43a-44a. Permit denials are generally subject to challenge in State courts. Thus, Petitioners' fear that a State decision that is "indefensible based on the evidence presented" would be unreviewable, is unfounded. Pet. Br. at 15. Congress properly concluded that a State court can review and reverse such a decision.

Further, Petitioners err when they argue that it is illogical to read the statute as allowing FERC to review permits "encumbered with unreasonable conditions" but not permits "denied outright." Pet. Br. at 17. In the former case, FERC 'backstop" siting authority makes sense, because questions of whether State permit conditions render a project unable to significantly reduce interstate transmission congestion, or cause it to be economically infeasible, are best resolved with the aid of FERC's technical expertise. Congress further recognized that a State that has granted a permit has less of an interest in protecting the ability of State courts to review a decision.[6] A State that has conditionally approved a

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[6] Petitioners contend that it "could be entirely appropriate for a state to condition a project on terms that are economically onerous, depending on the circumstances of the particular proposal" Pet. Br. at 17. It is hard to imagine such a situation, however, because a state certifying a line under such circumstances is either a) mistaken about the wisdom of the

line, based on a finding that such line is needed, has no compelling interest against FERC review of the conditions the State has imposed. On the other hand, as the Fourth Circuit correctly observed, a State that imposes "project-sinking conditions . . . misuses its authority." *Piedmont*, 558 F.3d at 315; Pet. App. at 21a. Congress properly decided that FERC should be able to review and address any such misuse. Its decision to employ such a finely-tuned trigger for federal intrusion contradicts FERC's claim that it has jurisdiction whenever a State fails to approve a project within one year.

Petitioners also fail to justify the dissent's reasoning that the continuing effect of a State's denial beyond the statutory one-year period constitutes a "with[holding] approval for more than 1 year." Pet. Br. at 15. This is nonsensical because a State's review process concludes when a permit application is denied. A "withholding" on the part of a State only occurs while a decision is pending. Because a permit application ceases to be active after a permit denial, there can be no continuous "withholding" of approval after such a denial. Contrary to Petitioners' attempted analogy, Pet. Br. at 15, one cannot rightly say this Court has, for over 50 years, continuously withheld affirmance from parties who sought to preserve "separate-but-equal schools." As Petitioners recognize, "the actual holding was a discrete decision in 1954." An accurate characterization would therefore be that the Court long ago held that separate but equal schools are unconstitutional. Similarly, a State commission

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conditions, or b) should be denying approval because the line can only be certified on conditions making it uneconomic.

denying a permit application does so on a particular day, and does not continuously "withhold approval" thereafter.

The tightly restricted State role advocated by Petitioners, Pet. Br. at 18, including a mere "advisory" role through State participation in the FERC siting process, ignores Congressional concerns that FERC not act as a "Court of Appeals for energy companies dissatisfied with State decisions." *Comprehensive Nat'l Energy Policy: Hearings Before the Subcomm. on Energy and Air Quality of the Comm. on Energy and Commerce*, 108th Cong. 13 (2003).

B. An appellate court dissent does not create statutory "ambiguity" entitling an agency to judicial deference.

Petitioners' claim that the Fourth Circuit erred by not granting FERC's interpretation deference under Step Two of *Chevron* should be rejected. Pet. Br. at 19-20. In this case, no statutory "ambiguity" exists for *Chevron* purposes. Both the Fourth Circuit majority and dissent applied the *de novo* standard of *Chevron* Step One because they found that the issue should be decided based upon the plain meaning of the statutory language. *Piedmont*, 558 F.3d at 315, 321; Pet. App. at 23a, 38a. Thus, none of the Judges in the Fourth Circuit found the statute ambiguous in the relevant sense under *Chevron*.

Petitioners, however, advance the novel theory that §216(b)(1)(C) became ambiguous because the Fourth Circuit panel did not entirely agree on the plain meaning of the statute. *Id.* Petitioners, in effect, argue that literal "ambiguity" is equivalent to *Chevron*

"ambiguity." Petitioners rely upon this alleged "ambiguity" as a basis for arguing the Fourth Circuit erred by not proceeding to *Chevron* Step Two. Pet. Br. at 20.

This argument fundamentally misconstrues the meaning of the term "ambiguous" in the context of the *Chevron* analysis. "*Chevron* deference ... is not accorded merely because the statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Rather, deference to an agency's statutory interpretation is granted when the question requires "reconciling conflicting policies" and the policy question has been "committed to the agency's care by the statute ...." *Chevron*, 467 U.S. at 845 (*quoting United States v. Shimer*, 367 U.S. 374, 382-83 (1961)). Thus, "ambiguity" under *Chevron* is limited to situations where the agency is "resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-66. Because of this, *Chevron* Step Two is triggered only when Congress placed the agency in the role of policymaker, such that the statute may reasonably be read as an implicit grant of authority by Congress to the agency to decide the question. Here, however, Congress itself made the policy decisions, by very carefully delineating when FERC could exercise its limited "backstop" authority.

Moreover, under *Chevron*, judicial deference to an agency's statutory interpretation is only appropriate when the policy choice the agency seeks to make depends upon its technical expertise. Thus, "ambiguity" warranting judicial deference turns upon

whether "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron*, 467 U.S. at 845. In the instant case, the interpretation of the phrase "withheld approval for more than 1 year" is well within the competency of courts, and does not require FERC's special expertise. Indeed, FERC did no more than repeat the statutory language in its regulations. Pet. App. at 194a.

Finally, to find a statute "ambiguous" in the relevant sense, a court must first find that "Congress did not actually have an intent ...." *Chevron*, 467 U.S. at 845. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 & n.9. The lack of consensus among the Fourth Circuit judges does not support the needed finding that Congress did not actually have an intent. None of the judges believed Congress lacked intent as to the meaning of the phrase "withheld approval for more than 1 year" in §216(b)(1)(C). Conversely, all of the judges concluded that Congress' intent was clear and unambiguous. Given that none of the judges below found the statute to be "ambiguous" within the meaning of *Chevron*, their disagreement does not create ambiguity for *Chevron* review purposes.

Petitioners' theory, that a lack of judicial consensus renders a statute ambiguous such that a court must defer to the agency's statutory interpretation, demonstrates a fundamental misunderstanding of *Chevron*. Under *Chevron*, deference is not required

merely because judges disagree about the meaning of a statute. Deference is only appropriate when the statute can be read as an implicit delegation of authority to the agency to resolve the matter. *See Chevron*, 467 U.S. at 845 (referring to "conflicting policies that were committed to the agency's care by the statute ...."). Disagreement among judges is not equivalent to a Congressional grant of authority to the agency. Moreover, Petitioners' theory is paradoxical, inasmuch at it postulates a Congressional delegation of authority to the agency even when none of the judges on the panel found any such implicit grant by Congress.

Petitioners' novel theory is particularly unwarranted because it would effectively delegate power to an agency, even if none of the judges found that Congress intended the issue to be decided by the agency. Such a result would not only thwart Congressional intent, it would also fundamentally intrude upon the inner workings of the judiciary. By effectively chilling judicial deliberations, the rule advanced by Petitioners would improperly frustrate independent judicial review of the actions of administrative agencies, even in cases where the agency seeks to set the outer limits of its powers. Such a standard of judicial review, which Petitioners offer without supporting decisional authority, could have potentially far-reaching adverse consequences.

The cases cited by Petitioners do not support their "judicial ambiguity" theory. Pet. Br. at 20. In *In re Thinking Machs. Corp.*, 67 F.3d 1021, 1023 (1st Cir. 1995), the First Circuit interpreted a bankruptcy statute pertaining to rejection of nonresidential leases. The case did not involve an agency or a regulation, and

therefore did not involve judicial review of an agency's statutory interpretation within the *Chevron* framework. Moreover, the "collision of viewpoints" language quoted by petitioners, Pet. Br. at 20, refers to differences of opinion among numerous other courts, and not to a dissenting judge on a particular panel. *In re Thinking Machs. Corp.*, 67 F.3d at 1025.

The decision in *United Mine Workers v. Federal Mine Safety and Health Review Comm'n*, 917 F.2d 42 (D.C. Cir. 1990), is also inapposite. Petitioners' selective reliance on *dicta* suggesting a divided agency panel may indicate "ambiguity" is misleading because the court itself found the language of the statute to be "ambiguous." Pet. Br. at 20. The court's conclusion was based on its own analysis, and not upon disagreement of the agency commissioners. *United Mine Workers*, 917 F.2d at 47.

II. PETITIONERS FAIL TO DEMONSTRATE THAT CONGRESS DEEMED THE SPECIFIC STATUTORY LANGUAGE AT ISSUE TO BE CRITICAL TO NATIONAL ENERGY POLICY.

A. The history of EPAct 2005 does not expressly address the particular issue that the Fourth Circuit decided.

Petitioners generally argue that more investment in transmission infrastructure is needed for electric system reliability. Pet. Br. at 11-12. Nowhere, however, do Petitioners expressly assert that State siting denials are hindering transmission line construction, or threatening in any way the reliability

of the electric grid.[7] Indeed, they cannot. At best, Petitioners point to isolated statements in the legislative history indicating that EPAct 2005 was created to address "[s]iting challenges" and to "streamline the permitting of siting for transmission lines." Pet. Br. at 13. These statements do not establish, however, that Congress intended to authorize FERC to override timely State permit denials. Thus, Petitioners have not shown that the legislative history of EPAct 2005 sheds light upon the discrete, narrow question of whether Congress intended to authorize FERC to act when a State has denied a siting permit within one year. Notably, FERC itself acknowledged that the legislative history is unclear on this question. Rehearing Order, 119 F.E.R.C. ¶61,154 at ¶15; Pet. App. at 254a.

B. Transmission infrastructure development is affected by issues far more substantial than the siting approval process.

Petitioners imply that State siting denials – or any potential for such – are the primary reason for the electric power industry's failure to construct needed transmission infrastructure. Pet. Br. at 11-13. To the extent there are shortages in transmission capacity, the primary reasons for such shortages are not state permit denials but, rather, economics and market structure, as Congress recognized in enacting EPAct 2005.

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[7] Such denials should be contrasted to state process delays or a lack of state authority to consider interstate benefits of a line, which Congress intended to address.

In the past, vertically integrated utilities built transmission mainly to move electricity within their own geographic service areas. *New York v. FERC*, 535 U.S. at 5 (2002); U.S. Department of Energy, *National Transmission Grid Study*, at 3 (May 2002), *available at* http://www.ferc.gov/industries/electric/indus-act/transmission-grid.pdf. In 1996, FERC adopted rules (pursuant to the Energy Policy Act of 1992, 106 Stat. 2776) to foster a transition to a competitive wholesale electricity market. *Id.* at 10; *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21,540 (May 10, 1996) (Order No. 888). This competitive market structure gave rise to two new demands on the transmission grid. First, wholesale electricity sellers needed to transmit power to their purchasers – which often required transmitting power across utility service territory boundaries. *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 479 (7th Cir. 2009) (Cudahy, J., concurring in part and dissenting in part). Second, newly constructed non-utility generators selling into the wholesale market required new lines to connect their output to the grid. *Id.*; *18 C.F.R. pt. 35 – Promoting Transmission Investment through Pricing Reform*, 116 F.E.R.C. ¶61,057, 61,250 at ¶25 (July 20, 2006).

In 2002, the DOE found that a major barrier to construction of new transmission facilities was developers' uncertainty as to whether they could realize sufficient earnings on their financial investments in transmission projects. *National Transmission Grid Study* at 30. Consequently, Congress created in EPAct 2005 new FPA §219, which required FERC to establish incentive-based transmission rates to, *inter alia*, "provide a return on

equity that attracts new investment in transmission facilities." EPAct 2005 §1241(a), (b)(2), codified at 16 U.S.C. §824*s*(a), (b)(2). FERC has found it necessary to approve rates of return in excess of 12.5% to attract such investment. *18 C.F.R. pt. 35 – Promoting Transmission Investment through Pricing Reform*, 113 F.E.R.C. ¶61,182, 61,276 at ¶21 (proposed Nov. 18, 2005). As FERC acknowledged in its §219 rulemaking, the debate over "whether transmission incentives are necessary to encourage new infrastructure was put to rest by the plain language of section 219(a)." Order No. 679 at ¶19.[8] Thus, continuing uncertainty as to return on investment, rather than prompt State permit denials, is likely the primary obstacle to transmission infrastructure development.[9] Because this case is not about transmission financing, it does not present an opportunity for the Court to advance the construction of new transmission facilities.[10]

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[8] The investment incentive problem remains particularly acute for so-called "merchant transmission lines," for which the developer receives payment via private agreements, rather than by rates established through regulatory and/or planning processes. *Chinook Power Transmission*, 126 F.E.R.C. ¶61,134, 61,767 at ¶45 (2009).

[9] In fact, one of the pending siting applications Petitioners point to in their petition (at 9) was withdrawn by the applicant one week after FERC refused to alter the regional grid operator's economic planning process so as to allow the project to receive incentive-based rates under the grid operator's tariff. *N.Y. Indep. Sys. Operator, Inc.*, 126 F.E.R.C. ¶61,320, 18-43 (2009) (order on reh'g).

[10] Another major factor affecting investment in transmission facilities is the allocation of costs among electric utilities. That topic was recently addressed by the United States Court of Appeals for the Seventh Circuit. *Illinois Commerce Comm'n*, 576

C. Siting-related legislation remains a work in progress.

The overall field of electric transmission policy remains in flux. Congress continues to refine its approach to electric transmission facilities siting. In light of new federal policy fostering renewable energy facilities construction, the House of Representatives passed the American Clean Energy and Security Act of 2009, that would further tailor FERC's siting jurisdiction. H.R. 2454, 111th Cong. (2009).[11] This bill would expedite deployment of new transmission capacity to connect such renewable energy facilities to the power grid. *Id.* at §151. As a practical matter, therefore, there is no urgency warranting the Court's attention because Congress is actively dealing with transmission siting issues.

III. NO HARM WILL RESULT FROM ALLOWING THE FOURTH CIRCUIT'S DECISION TO STAND.

Petitioners overstate the potential consequences of this Court's denial of certiorari. They speculate that some siting applications will not be filed if State siting denials cannot be reviewed by "a body taking a broader regional or national perspective." Pet. Br. at 21-22. This argument fails to credit Congress' express decision to preserve the primary siting jurisdiction of States having legal authority to consider the expected

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F.3d 470. The case was remanded to FERC for further proceedings.

[11] A Senate version was introduced by Senators Kerry and Boxer on September 30, 2009.

interstate benefits of proposed transmission. 16 U.S.C. §824*p*(b)(1)(A)(ii)). Congress did this because it recognized that the States directly and materially benefit from the interconnected electric grid and, therefore, have a compelling local interest in considering the interstate benefits of proposed transmission facilities. Petitioners' contrary implication that States are entirely parochial when reviewing proposed transmission facilities is baseless. Furthermore, inherent in Petitioners' speculation is the notion that a State court reviewing a State agency's siting denial would fail to give effect to Congress' implicit directive to consider interstate benefits. Petitioners offer no basis for their presumptions that State courts would act inappropriately in reviewing State agency decisions.

The worst-case scenario for transmission developers is that the Fourth Circuit's decision will encourage them to work closely and cooperatively with State siting authorities. This can hardly be perceived as a deleterious consequence.

CONCLUSION

For the foregoing reasons, Petitioners do not state any compelling reasons for granting the petition for a writ of certiorari. Therefore, the petition should be denied.

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Dated: October 21, 2009

SUPREME COURT, U.S.
FILED

No. 09-343

In the Supreme Court of the United States

EDISON ELECTRIC INSTITUTE, ET AL., PETITIONERS

v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 16 U.S.C. 824p(b)(1)(C)(i), which gives the Federal Energy Regulatory Commission authority to issue a permit for the construction of a transmission facility in a national interest electric transmission corridor when a State has "withheld approval for more than 1 year after the filing of an application," allows the Commission to act after a State has denied an application.

2. Whether the court of appeals had jurisdiction to consider respondents' challenge to the Commission's interpretation of 16 U.S.C. 824p(b)(1)(C)(i).

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In the Supreme Court of the United States

No. 09-343

EDISON ELECTRIC INSTITUTE, ET AL., PETITIONERS

v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 558 F.3d 304. The orders of the Federal Energy Regulatory Commission (Pet. App. 52a-245a, 246a-292a) are reported at 71 Fed. Reg. 69,440 and 119 F.E.R.C. ¶ 61,154, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. Petitions for rehearing were denied on April 20, 2009 (Pet. App. 50a-51a). On July 13, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 18, 2009. On August 7, 2009, the Chief Justice further

extended the time to September 17, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (FERC or Commission) exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce" by public utilities. 16 U.S.C. 824(b)(1). Traditionally, the States have "assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities," and, "[a]s a result, the nation's transmission grid is an interconnected patchwork of state-authorized facilities." Pet. App. 11a. Because of that fragmentation, "increasing concerns have been expressed about the capacity and reliability of the grid." *Ibid.*

In response to those concerns, Congress included in the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221(a), 119 Stat. 946 (16 U.S.C. 824p), authorization for the Secretary of Energy to designate certain areas with electricity-transmission constraints as "national interest electric transmission corridor[s]." 16 U.S.C. 824p(a)(2). In such corridors, FERC has the authority to issue "permits for the construction or modification of electric transmission facilities" if certain conditions are met. 16 U.S.C. 824p(b). As relevant here, the Commission must first find that the State in which the facilities are to be sited lacks adequate authority to approve transmission siting or to consider the interstate benefits of a proposed facility, 16 U.S.C. 824p(b)(1)(A); that the

applicant does not qualify to apply for siting approval in the State, 16 U.S.C. 824p(b)(1)(B); or that:

> (C) a State commission or other entity that has authority to approve the siting of the facilities has—
>
> > (i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or
> >
> > (ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.

16 U.S.C. 824p(b)(1)(C).

If one of those requirements is met, the Commission may exercise jurisdiction and issue a permit only upon making the additional findings that the proposed project (1) will be used to transmit electric energy in interstate commerce; (2) is consistent with the public interest; (3) will significantly reduce transmission congestion in interstate commerce and protect or benefit consumers; (4) is consistent with sound national energy policy and will enhance energy independence; and (5) will maximize, to the extent reasonable and economical, the transmission capabilities of existing facilities. 16 U.S.C. 824p(b)(2)-(6).

2. a. Section 824p directs FERC to issue regulations specifying the form of, and the information to be contained in, an application for the construction or modification of electricity-transmission facilities in a national interest corridor. 16 U.S.C. 824p(c)(2). In a notice-and-

comment rulemaking, the Commission adopted such regulations. Pet. App. 52a-245a. In doing so, FERC interpreted the statutory phrase "withheld approval for more than 1 year" to govern cases in which States have denied permits. *Ibid.*

The Commission observed that the statute "does not explicitly define the full range of state actions that are deemed to be withholding approval," and it determined that "a reasonable interpretation of the language in the context of the legislation supports a finding that withholding approval includes denial of an application." Pet. App. 70a. In reaching that conclusion, the Commission observed that "the term 'withhold' in this context means to refrain from granting approval, and, conversely, the term 'deny' is synonymous with 'withhold.'" *Id.* at 73a. FERC also pointed out that Section 824p(b)(1)(C)(ii) "provide[s] the Commission with the authority to intervene in circumstances where a State has issued an authorization which will essentially prevent a project from going forward," concluding that "it would not be reasonable to interpret the statute in such a manner that would leave the Commission without authority to intervene in instances where a State has expressly denied an application." *Id.* at 71a-72a. And the Commission cited a House Committee report stating that the statute permits FERC to issue a permit "if, after one year, a State is unable or refuses to site the line." *Id.* at 72a (quoting H.R. Rep. No. 65, 108th Cong., 1st Sess. 170 (2003)).

b. On rehearing, the Commission reiterated that "the most common sense reading of 'withheld approval for more than 1 year' encompasses any action—whether it is a failure to act or an outright denial—that results in an applicant not having received state approval at the end of one year." Pet. App. 252a. The Commission em-

phasized that the purpose of Section 824p is "to facilitate the process of siting critical regional transmission lines and facilities," thereby "ensuring adequate capacity and increased reliability on the electric transmission grid"—a purpose that the Commission's interpretation furthered. *Id.* at 257a.

3. A divided panel of the court of appeals granted petitions for review in relevant part and set aside FERC's interpretation of Section 824p. Pet. App. 1a-49a.

a. The court of appeals held that "[t]he continuous act of withholding approval for more than a year cannot include the finite act of denying an application within the one-year deadline." Pet. App. 17a. Instead, the court reasoned, "[t]he denial of an application is a final act that stops the running of time during which approval was withheld on a pending application." *Ibid.* The court concluded that the statute confers jurisdiction on FERC "only when a state commission is unable to act on a permit application in a national interest corridor, fails to act in a timely manner, or acts inappropriately by granting a permit with project-killing conditions," but not when a state commission denies an application outright. *Id.* at 22a-23a. The court therefore reversed FERC's interpretation of 16 U.S.C. 824p(b)(1)(C)(i). Pet. App. 23a, 33a.

b. Judge Traxler dissented in relevant part. Pet. App. 34a-49a. In his view, "[u]nder the common meaning of the words 'withhold' and 'approval,' approval is withheld, *i.e.*, not granted, every day that no decision is issued granting approval, and it continues to be withheld on the day an application is denied (as well as every day that such a denial is not reconsidered)." *Id.* at 42a. He noted that the Commission's interpretation "is also but-

tressed by the applicable legislative history," which indicates that Congress "primarily had in mind situations in which a state denied a permit that was necessary to ensure reliability of the national transmission grid, not simply situations where a state had not ruled on an application for a certain period of time." *Id.* at 46a-47a. Finally, Judge Traxler stated that "even assuming *arguendo* that the statute's meaning were not plain, [he] would conclude that FERC's interpretation was reasonable at the very least, and therefore entitled to deference under" *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Pet. App. 49a.

4. The court of appeals denied petitions for rehearing en banc. Pet. App. 50a-51a.

ARGUMENT

Under 16 U.S.C. 824p(b)(1)(C)(i), FERC has the authority to issue permits for the construction of electric transmission lines in designated national interest transmission corridors if a State has "withheld approval for more than 1 year after the filing of an application." The court of appeals erred in setting aside FERC's reasonable interpretation of Section 824p and holding that the statute allows the Commission to issue a permit only if a State has failed to act on an application, but not if has denied an application. The court's interpretation could have serious consequences, and the question presented therefore could warrant this Court's review in an appropriate case.

This case, however, is not an appropriate vehicle for resolving the question presented. The court below is the first court of appeals to consider the interpretation of Section 824p. Moreover, there is a substantial question whether the court of appeals had jurisdiction to review

FERC's interpretation of the statute in this case. The petition for a writ of certiorari should therefore be denied.

1. Petitioners are correct in arguing (Pet. 14-21) that the court of appeals erred in setting aside FERC's interpretation of Section 824p. The Commission's interpretation represents the most natural reading of the statutory text, best harmonizes all the provisions of the statute, and most effectively promotes the congressional purpose. And because it represents FERC's authoritative construction of a statute the agency is charged with administering, it is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Since the Commission's reading is, at a minimum, permissible, the court erred in failing to uphold it.

a. The Commission's interpretation of Section 824p is consistent with the ordinary meaning of the statutory terms. As the court of appeals acknowledged, the word "withhold" means "to desist or refrain from granting, giving, or allowing." Pet. App. 17a (quoting *Webster's Third New International Dictionary* 2627 (1993)). It follows, as the Commission reasoned, that a State has "withheld approval" of a permit application whenever it has refused to grant a permit, including when it has denied the application. Indeed, this Court has used the word "withheld" in a similar way, noting that, when an agency refused a request that it produce documents under the Freedom of Information Act, "it undoubtedly 'withheld' [the documents] in any reasonable sense of that term." *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 150 (1989).

The court of appeals emphasized that the phrase "withheld approval" is accompanied by the phrase "for more than 1 year." Pet. App. 17a. In its view, "withheld

approval" can only refer to approval that has been held back "*continuously* over a period of time (more than one year)," which would exclude the "finite act" of denying an application. *Ibid.* But as Judge Traxler explained, applying the common meaning of the word "withhold"—"[t]o keep back; decline to grant"—"yields a straightforward rule that a state has 'withheld approval for more than 1 year' when one year after approval has been sought, the state still has not granted it, regardless of the reason." *Id.* at 41a (dissenting opinion). "Under the common meaning of the words 'withhold' and 'approval,' approval is withheld, *i.e.*, not granted, every day that no decision is issued granting approval, and it continues to be withheld on the day an application is denied (as well as every day that such a denial is not reconsidered)." *Id.* at 42a.

The analysis of the court of appeals is also flawed in that it fails to give effect to the word "approval." If the operative language were "withheld action" or "withheld decision," then it would make sense to say that the statute does not apply when an application is denied. But the statute refers to "approval," and denial is the opposite of approval. If, 366 days after the filing of an application with a state siting authority, the application has been denied, then the State has withheld approval for more than one year.

b. The court of appeals believed that, because the other circumstances under which FERC may exercise siting authority are what it described as "limited grants of jurisdiction," the "withheld approval" clause should be given a similarly limited construction. Pet. App. 20a. As the court put it, "if Congress had intended to take the monumental step of preempting state jurisdiction *every time* a state commission denies a permit in a national

interest corridor, it would surely have said so directly." *Id.* at 20a-21a. The court of appeals misunderstood the statutory scheme. Section 824p does not broadly preempt state jurisdiction. All States have initial authority to make a siting determination under state law, even in national interest corridors. If a State has withheld approval in a national interest corridor, FERC may issue a permit only if it makes a series of specific determinations under federal law that might not have been the focus of state proceedings, including that the proposed authorization or modification of transmission facilities "will significantly reduce transmission congestion in interstate commerce" and is "consistent with sound national energy policy and will enhance energy independence." 16 U.S.C. 824p(b)(4) and (5). Accordingly, FERC may override a State's denial of siting approval only in certain specified circumstances.

Once the operation of Section 824p(b)(1)(C)(i) is thus properly understood, then as Judge Traxler explained, "only FERC's interpretation makes sense in the context in which the language is used and in the context of the statute as a whole." Pet. App. 48a (dissenting opinion). The subsection granting FERC siting authority when a state has "withheld approval for more than 1 year" (16 U.S.C. 824p(b)(1)(C)(i)) is immediately followed by 16 U.S.C. 824p(b)(1)(C)(ii), which gives FERC siting authority when a state has granted approval but "conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible." It would have made little sense for Congress to have given FERC the authority to override a State decision approving a permit but imposing onerous conditions, while leaving FERC powerless to

act when a State denies a permit application altogether. See Pet. App. 44a (Traxler, J., dissenting).

In addition, the decision below fails to take account of 16 U.S.C. 824p(i), which creates a mechanism for States to defeat federal control over siting decisions. Section 824p(i) grants Congress's consent for three or more States to enter into an interstate compact governing the siting of transmission facilities. When States have entered into such a compact, "[t]he Commission shall have no authority to issue a permit for the construction * * * of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement." 16 U.S.C. 824p(i). The express provision that FERC may not override the denial of a permit when compacting States are in agreement, but may do so when they are not, supports the conclusion that FERC may override a denial by an individual State outside a compact. See Pet. App. 258a-259a; *id.* at 45a (Traxler, J., dissenting).

c. FERC's interpretation also promotes the statutory purpose of assuring that critical transmission facilities are sited in designated national interest corridors. By contrast, the court of appeals' interpretation would permit an individual State to thwart the goal of reducing capacity constraints and congestion in national interest corridors merely by denying a siting permit. In other words, a State could deny a critical piece of transmission infrastructure for purely local reasons, with no opportunity for federal review of whether the project is in the national interest.

The legislative history confirms that Congress intended Section 824p to allow FERC to issue permits in national interest corridors "if, after one year, a state, or other approval authority, is unable *or refuses* to site the

line." H.R. Rep. No. 215, 109th Cong., 1st Sess. Pt. 1, at 261 (2005) (emphasis added). Indeed, even Members of Congress who opposed Section 824p understood it to have that effect; the dissenting members of the House Committee objected that the bill "includes transmission-siting provisions that preempt * * * state decisions about whether new or expanded lines should be built." *Id.* at 494; see Pet. App. 46a-47a (Traxler, J., dissenting).

FERC's interpretation of "withheld approval" does not, as the court of appeals believed, render state review of siting applications "futile." Pet. App. 20a. In enacting 16 U.S.C. 824p, Congress recognized States' traditional siting authority by providing States a full year to site critical facilities under their own laws. Under Section 824p, States may impose conditions on any siting permit as long as the conditions are economically feasible and would not prevent significant reduction of congestion. 16 U.S.C. 824p(b)(1)(C)(ii). That preserves the state's ability to condition and control the circumstances of the siting.

Significantly, the Commission may not exercise siting authority over national interest corridor projects simply based upon a finding that a State has "withheld approval." Instead, several additional findings are required before the Commission may do so. See 16 U.S.C. 824p(b)(2)-(6). And the filing of an application with the Commission does not mean that valid state concerns are no longer considered. See Pet. App. 74a. Instead, the Commission takes state determinations into consideration in making its own permitting decisions. The state decision and state-compiled record become part of the FERC record and are considered "to the maximum extent possible." *Id.* at 120a-121a; see *id.* at 79a-80a, 268a-

269a. The statute also requires that the Commission offer States an opportunity to comment on "the need for and impact of a facility covered by the permit." 16 U.S.C. 824p(d). As parties to the FERC proceeding, States may file requests for rehearing following a permitting decision, and, if they remain aggrieved, they may petition for review in the court of appeals. Pet. App. 104a; 16 U.S.C. 825*l*.

2. The court of appeals' interpretation of Section 824p(b)(1)(C)(i) is not only erroneous but also could have serious consequences. Congress recognized that difficulty in siting new transmission facilities—and, in particular, difficulty in obtaining state regulatory approval for such siting—is a significant factor contributing to inadequate investment in transmission infrastructure. See S. Rep. No. 78, 109th Cong., 1st. Sess. 8 (2005) ("Siting challenges, including a lack of coordination among States, impede the improvement of the electric system."). The interpretation adopted by the court below permits any State, simply by denying a permit to site or construct transmission facilities, to derail the multi-state transmission projects necessary to assure reliability in national interest corridors, regardless of how important those projects may be to the national interest and to relieving congestion on the interstate grid. See *Transmission Infrastructure: Hearing Before the Senate Comm. on Energy and Natural Resources*, 111th Cong., 1st Sess. 11 (2009) (Wellinghoff Senate Testimony) (testimony of Jon Wellinghoff, FERC Chairman). Thus, the decision "is a significant constraint on the Commission's already-limited ability to approve appropriate projects to transmit energy in interstate commerce." *Ibid.*; see *The Future of the Grid: Proposals for Reforming National Transmission*

Policy: Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Energy and Commerce, 111th Cong., 1st Sess. 5 (2009) (same) (Wellinghoff House Testimony).[1]

The need for regionally- and nationally-based oversight is significant. The electric grid was built by utilities over the last 100 years primarily to serve local customers. But a doubling of electricity demand and generation over the past three decades, and the emergence of competitive wholesale electricity markets, has significantly increased the need to transfer large amounts of electricity regionally across the grid. *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors, Notice of Proposed Rulemaking*, 71 Fed. Reg. 36,258 (2006). While there has been some expansion of regional and inter-regional transmission facilities over the last 15 years, that expansion is not nearly sufficient to address the need for transmission infrastructure to meet state and national goals. Wellinghoff House Testimony 4. Without adequate siting authority, the Commission's ability to address these challenges is limited. *Ibid.*

In designating the two national interest electric transmission corridors identified to date under Section 824p—the Mid-Atlantic Area corridor and the Southwest Area corridor (consisting of parts of California and Arizona)—the Department of Energy determined that congestion in those areas causes consumers to face consistently higher electricity prices, poses threats to the reliability of electricity supply, limits supply diversity and energy independence, and raises national-security

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[1] http://energycommerce.house.gov/Press_111/20090612/testimony_wellinghoff.pdf.

concerns. 72 Fed. Reg. 56,992, 57,005, 57,014, 57,016, 57,021 (2007). Given the increasingly interconnected nature of the transmission grid and wholesale power markets, the siting of necessary electric facilities poses increasingly complex issues of balancing competing interests, particularly as "[t]ensions can exist between what is perceived to be best for a region as a whole versus what is perceived to be best for an individual State or a portion of one State." *Id.* at 57,014; see *id.* at 57,021.

Transmission infrastructure development, moreover, is necessary not only to eliminate capacity constraints and congestion on the transmission grid but also to permit the delivery of renewable power, such as solar and wind power, to bring the power from the remote areas in which it is most efficiently produced to the metropolitan areas where it is most needed. Wellinghoff Senate Testimony 2; Wellinghoff House Testimony 2. Renewable energy sources, such as wind and solar, typically are located in rural areas. While they may only take a year or two to construct, the time needed for siting and construction of transmission lines may average five years, presenting significant barriers to the development of such projects. See Aaron S. Lax, *A High-Wire Balancing Act: Federal Energy Transmission Corridors*, 23 ABA Sec. Nat. Resources & Env't 18, 54 (2008).

3. Although the question presented is important, review is not warranted at this time. The Fourth Circuit did not review a decision by FERC concerning an actual application for a permit to construct a transmission line. It considered FERC's statutory interpretation in the abstract. Moreover, the Fourth Circuit is the only court of appeals to have considered the Commission's interpretation of Section 824p. Contrary to petitioners' sug-

gestion (Pet. 22), there will be opportunities for other courts to examine the issue. If a party seeking to build a transmission facility in a national interest corridor outside the Fourth Circuit were to seek a permit from FERC after having been denied a permit by a State, FERC's decision—whether or not it was consistent with the decision in this case—would be subject to review in another court of appeals. See 16 U.S.C. 825*l*(b).

In addition, there is a substantial question whether the court of appeals properly considered respondents' challenge to FERC's interpretation of Section 824p(b)(1)(C)(i) in this case. The Commission's interpretation of that statutory provision was not set forth in a Commission regulation but only in the preamble issued as part of a rulemaking. And although that interpretation makes it more likely that FERC will ultimately issue a permit if it should be presented with an application following a denial by a State, the interpretation does not have any immediate, concrete effect on respondents. Rather, it will affect them in the future only if and when FERC issues a permit to build a transmission line—which would occur only if FERC first determined that all of the other criteria necessary for issuance of a permit were satisfied. These circumstances of respondents' challenge raise issues of both standing and ripeness. Although those issues were not raised below, they could prevent the Court from reaching the question presented if it were to grant review.

In the court of appeals, Piedmont Environmental Council, the Minnesota Public Utilities Commission, and the New York Public Service Commission filed a joint brief in which they made no effort to demonstrate that the requirements of standing were satisfied for their challenge to FERC's statutory interpretation. The

other respondent is Communities Against Regional Interconnect (CARI), an association of seven New York counties and four community organizations. CARI filed a brief noting that an application to build a transmission line had been filed with the New York Public Service Commission, and asserting that FERC's "expansive interpretation of its authority and jurisdiction * * * [is] the source of cognizable injury to CARI and its members, including decreased land values, the taking of land by condemnation, increased utility rates and numerous potential and threatened environmental impacts." CARI C.A. Br. 12. But there would be no injury fairly traceable to action by FERC—rather than to measures taken in connection with the application filed with the New York Public Service Commission—unless the New York Public Service Commission denied the application, the sponsor of the project then filed an application with FERC, and FERC granted that application. The brief said nothing to establish that any of those intermediate events was likely.[2]

Thus, respondents did not carry their burden of establishing that they faced an injury that was "actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citation omitted). This case there-

[2] In fact, in April 2009, the New York Regional Interconnect (NYRI) withdrew its petition with the New York Department of Public Service for a certificate of approval of the proposed facility, and the New York Department of Public Service granted the request for withdrawal, with prejudice. See Letter to Leonard H. Singer from Jaclyn A. Brilling, Secretary, New York Department of Public Service (Apr. 21, 2009). Thus, even if the pendency of the application with the New York Department of Public Service might once have given rise to a live, ripe controversy concerning a possible siting in New York, there is no such controversy now.

fore is similar to *Summers* v. *Earth Island Institute*, 129 S. Ct. 1142 (2009). In *Summers*, the Court held that a group of environmental organizations lacked standing to challenge a Forest Service regulation exempting certain projects from notice-and-comment procedures. *Id.* at 1147-1148. In reaching that conclusion, the Court emphasized that the organizations had identified no actual "application of the * * * regulations that threatens imminent and concrete harm to the interests of their members." *Id.* at 1150. Much the same is true here, since FERC's interpretation of Section 824p will have no concrete effect on respondents unless and until a party seeking to build a transmission line applies for a state permit, the State denies a permit, the party applies to FERC for a permit, and FERC decides to grant a permit to construct a transmission facility in a location and manner that adversely affects the interests of one or more respondents. For similar reasons, respondents did not establish that they were "aggrieved" by the order that contained FERC's statutory interpretation, which is a requirement for invoking the jurisdiction of the court of appeals under 16 U.S.C. 825*l*(b).

Alternatively, the problem raised by the nature of respondents' challenge in this case may be conceptualized as one of ripeness. The statements in FERC's order concerning the interpretation of Section 824p(b)(1)(C)(i) "do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998). None of those consequences would occur unless and until FERC issued a permit (following a

state denial of approval) for a transmission facility in a location that would have a concrete impact on respondents' legally cognizable interests. FERC's interpretation therefore was not ripe for judicial review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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EDISON ELECTRIC INSTITUTE; AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; AMERICAN WIND ENERGY ASSOCIATION; ALLEGHENY POWER; TRANS-ALLEGHENY INTERSTATE LINE CO.; AND SAN DIEGO GAS & ELECTRIC CO.,
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v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents attempt to downplay the significance of this case and argue that the Fourth Circuit correctly held that Section 216 of EPAct 2005 does not grant FERC backstop siting authority over state denials of applications to construct electric transmission facilities. But the Solicitor General's brief, along with the *amicus* briefs from the FERC Commissioners who served from 1993-2009 and the Chamber of Commerce, confirm that the scope of FERC's backstop authority is, indeed, "important" to national energy policy and even implicates "national-security concerns." SG Br. 13-14; *see also* Former FERC Comm'rs Br. 6-18; Chamber Br. 5-11. Those briefs also make clear that the Fourth Circuit's interpretation of the statute is erroneous.

That leaves as the only potential justification for denying review the Solicitor General's suggestion that this Court should forego review for prudential reasons. But none of the Solicitor General's arguments in this respect justifies allowing the Fourth Circuit's decision to stand. It is very difficult, if not impossible, to imagine this Court having another opportunity to address this issue. And any infirmity in the Fourth Circuit's exercise of jurisdiction simply provides additional reason for this Court's intervention. It does not counsel allowing such an important and harmful decision to stand.

1. Respondents dispute the importance of this case on two grounds. Neither is persuasive.

First, respondents contend that "this case does not present an important question of Federal law" because it involves a "straightforward application of *Chevron U.S.A. v. Nat. Resources Def. Council*, 467 U.S. 837 (1984)." BIO 12. But this argument misapprehends the reason why review is necessary. The point of the petition is not to seek an elaboration in *Chevron* jurisprudence. Rather, the petition asks this Court to resolve the meaning of Section 216 of EPAct 2005. And this Court regularly grants review of these kinds of statutory interpretation questions, even when their resolution does not promise to establish any new canon of statutory construction or to revise the *Chevron* framework. *See, e.g., New York v. FERC,* 535 U.S. 1, 16 (2002) (*certiorari* granted "[b]ecause of the importance" of the FERC rulemaking at issue); *see generally Coeur Alaska, Inc. v. Southeast Alaska Cons. Coun.*, 129 S. Ct. 2458 (2009) (applying *Chevron* analysis to Clean Water Act issue); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (same); *Global Crossing Telecom., Inc. v. Metrophones Telecom., Inc.*, 550 U.S. 45 (2007) (same respecting Communications Act issue).

Second, respondents assert that transmission siting is not very important because economics and market structure play a larger role in the development of transmission infrastructure. BIO 26-27. But as the Solicitor General and the *amici* explain, "difficulty in siting new transmission facilities – and, in particular, difficulty in obtaining

state regulatory approval for such siting – *is* a significant factor contributing to inadequate investment in transmission infrastructure." SG Br. 12 (emphasis added); *see also* Former FERC Comm'rs Br. 10-18; Chamber Br. 9-10.

Contrary to respondent's suggestion (BIO 25-26 & n.7), state *denials* are just as much of an obstacle in this respect as are delays and unreasonable conditions. As the Solicitor General explains, the Fourth Circuit's decision allows "any State, simply by denying a permit to site or construct transmission facilities, to derail the multi-state transmission projects necessary to assure reliability in national interest corridors, regardless of how important those projects may be to the national interest in relieving congestion on the interstate grid." SG Br. 12. That is why the National Energy Policy proposal that led to EPAct 2005 specifically targeted "state *rejections* of transmission projects as a causal factor in transmission constraints." Former FERC Comm'rs Br. at 20 (citing examples). Excluding state denials from FERC's backstop authority would create a gaping loophole – allowing states to evade EPAct 2005's goal of preventing state commissions from thwarting national transmission siting interests.

Respondents say that this loophole will merely incentivize industry to work closely and cooperatively with state authorities. BIO 29. But that is exactly the system Congress decided was broken and needed to be changed, because state authorities all too often consider only local interests. Former FERC Comm'rs Br. 17, 20. The states, no doubt, have a preference for the "status quo ante."

Id. at 27. But they cannot reasonably challenge Congress's decision that it was important to change the status quo.[1]

2. Respondents' attempt to defend the Fourth Circuit's decision is unconvincing. As the Solicitor General explains, FERC's interpretation of Section 216 "represents the most natural reading of the statutory text, best harmonizes all of the provisions of the statute, and most effectively promotes the congressional purpose." SG Br. 7.

a. *Text.* Echoing the Fourth Circuit's majority, respondents argue that the word "withheld" in the statutory phrase "withheld approval" is a "continuous" term, while a "denial" is "instantaneous." BIO 13, 20. Not so. The act of "withholding" can be based on a particular event, as when one speaks of consent being "unreasonably withheld." Chamber Br. 13. In any event, respondents have no answer for the fact that the word "withheld" precedes "approval," not a word such as "action" or "decision." Denying an application is unquestionably a form of withholding approval. "[D]enial is the opposite of approval." SG Br. 8.

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[1] Respondents also suggest at the end of their filing that it is not necessary to address the question presented now because energy policy is generally "in flux" and Congress is considering new legislation concerning "renewable energy facilities." BIO 29. But given the importance of energy to our modern economy, Congress will probably always be considering energy legislation of one form or another. That reality provides no reason to deny review concerning legislation that has actually been enacted.

b. *Statutory structure and purpose.* Respondents' more generalized arguments fare no better. Respondents first argue that there is no reason that Congress would have been concerned with state denials, because such decisions are reviewable in state courts. BIO 10. The Fourth Circuit did not rely on this rationale, and for good reason; it ignores the fact that state commissions' denials that thwart federal interests are often *consistent* with state law and thus cannot be disturbed on appeal in state courts. *See* National Energy Policy Dev. Group, National Energy Policy, at 7-7 (2001) ("Some state siting laws require that the benefits of a proposed transmission facility accrue to the individual state, resulting in the rejection of transmission proposals that benefit an entire region, rather than a single state."); Former FERC Comm'rs Br. 17 n.15 (citing examples of this phenomenon).

Respondents also suggest that allowing FERC to override state denials of permits would upset a carefully calibrated federal/state balance. BIO 4-5, 15-16. But contrary to respondents' suggestions, FERC's rule does not prevent states from playing a significant role in siting decisions in National Interest Corridors. States retain the power to consider applications in the first instance and to enforce state requirements that do not conflict with national energy policy. *See* Pet. 18. Even with respect to assessing federal considerations, the mere fact that one decision-making body's work is reviewable by another hardly renders the first body's work "futile." Pet. App. 20a. A federal district

court's work is not futile simply because it is reviewable in a federal court of appeals.

c. *Statutory history.* Respondents argue that early drafts of the legislation that became EPAct 2005, which separated the concept of "withholding" approval from "delaying" approval, support reading the two terms to mean the same thing. BIO 3-4. But just the opposite is true; this history shows that Congress always understood the term "withheld" to mean more than merely delaying issuance of a decision. *See* Former FERC Comm'rs Br. 21-26. Congress's decision to drop the "delaying" phrase from the final legislation shows that it understood the "withholding approval" phrase to cover both denials and delays.

d. Chevron *analysis.* Finally, respondents attack petitioners' deference argument in two ways. First, they protest that "[a]n appellate court dissent does not create statutory 'ambiguity' entitling an agency to judicial deference." BIO 21. That may be true, but no one is making that argument here. Instead, petitioners are merely making the common-sense observation that when federal judges construe statutory language in diametrically opposite ways, that is a data point suggesting the statute at issue is ambiguous. Pet. 20; *see also* Chamber Br. 13-14. The cases petitioners cite speak for themselves in this regard.

Second, respondents assert that *Chevron* deference is appropriate only when the agency at issue brought its expertise to bear in the order at issue. BIO 23-24. Again, this may be true, but it

does not help respondents. FERC clearly brought its expertise to bear when it decided how far its backstop siting authority needed to extend to be able to break logjams at the state level that thwart national energy policy.

3. The Solicitor General suggests that even though the Fourth Circuit's decision misconstrues a vital component of our national energy policy – and thus "could have serious consequences" – this Court's review "is not warranted at this time" for two prudential reasons. SG Br. 12, 14. Neither purported reason withstands scrutiny.

a. The Solicitor General first suggests that this Court will have other opportunities to examine whether FERC's backstop authority covers state denials of permit applications. According to the Solicitor General, "[i]f a party seeking to build a transmission facility in a national interest corridor outside the Fourth Circuit were to seek a permit from FERC after having been denied a permit by a State," FERC would be free to agree or disagree with the Fourth Circuit's decision, and review from that decision would be possible in a federal court of appeals. SG Br. 15.

This is a puzzling suggestion on several levels. As an initial matter, this case represents a consolidated action under 28 U.S.C. § 2112 of petitions for review from the Second, Fourth, and D.C. Circuits. *See* Pet. 8-9. The whole point of such consolidated actions is "centralizing . . . judicial review and avoiding conflicts which might obtain if the parties could go to any court that had venue."

Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486, 544 (1968) (Douglas, J., dissenting in part). Thus, courts have held that a circuit that hears a consolidated challenge to an agency rule is the "sole forum for addressing challenges to the validity of the [rule]." *GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999); *accord US West Comm., Inc. v. Hamilton*, 224 F.3d 1049, 1054 (9th Cir. 2000).

Even apart from the nature of consolidated challenges to agency orders, petitioners are at a loss to understand how FERC could disregard the Fourth Circuit's decision even in a case arising outside that jurisdiction. FERC was a party in the Fourth Circuit and thus is seemingly bound by the Fourth Circuit's decision invalidating FERC's construction of Section 216. For example, in *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856 (D.C. Cir. 2003), FERC decided to continue enforcing an order that the D.C. Circuit had held conflicted with a federal statute. The D.C. Circuit had little patience for FERC's explanation that it "still believed it was correct the first time," stating: "If FERC thinks we are wrong, then like any other litigant, it may petition for *certiorari* to the Supreme Court of the United States. Absent such a petition and the issuance of *certiorari*, in an order by the Supreme Court, FERC is bound by our decision." *Id.* at 859. The Solicitor General provides no reason to think that the same reasoning does not hold here. *See* Pet. 22.

To the extent the Solicitor General is suggesting that a utility company could generate a new case by seeking review in a different federal court of appeals from a future FERC order refusing

to exercise backstop siting authority respecting a state denial of a permit, there are at least two difficulties with that suggestion. First, the Solicitor General ignores the enormous amount of resources a utility company must invest to prepare, present, and pursue a permit application. *See* Pet. 21. If the Fourth Circuit's decision is left in place, it is highly unlikely that any utility company will be willing to pursue to FERC and the courts an application denied by a state commission, based simply on the hope that after spending millions of additional dollars and enduring additional years of administrative procedures and litigation, a different court of appeals will disagree with the Fourth Circuit and send the matter back to FERC for still further proceedings. It would be infinitely better – not to mention infinitely more consistent with EPAct 2005's purpose of spurring prompt development in National Interest Corridors – to definitively resolve proper interpretation of the Act here and now, without triggering years of substantial doubt as to the rights of developers and states.

Second, even if a utility company initiated a new case that resulted in a state denial and ultimately challenged in another federal court of appeals FERC's refusal to consider exercising backstop siting authority over the denial, the legal question this case presents might not be cleanly presented in that federal court of appeals as it is here. As a general rule, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference . . . if the prior court decision holds that its construction follows from the unambiguous terms of

the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). The Fourth Circuit held here that Section 216 leaves no room for FERC to exercise backstop siting authority over state denials. So in a future case in another court of appeals, it is questionable whether FERC would still be able to claim *Chevron* deference for its contrary interpretation of Section 216 – an interpretation which, by hypotheses, it would not even have applied when the case was before it.

At the same time, once such a future case was appealed to federal court, parties seeking to dispute FERC's original interpretation of Section 216 and who did not participate as parties in this case (which would include any state besides New York and Minnesota) could be foreclosed from challenging that interpretation on the ground that such a challenge is untimely. *See, e.g., Pacific Gas & Elec. Co. v. FERC*, 533 F.3d 820, 824-25 (D.C. Cir. 2008) (agreeing with FERC that a party could not challenge FERC's interpretation of federal statute in the context of a case-specific proceeding because the party did not bring a pre-enforcement challenge against FERC's earlier rulemaking order). Once again, it would be far better to resolve the meaning of Section 216 now, before the legal landscape becomes cluttered with potential procedural difficulties.

b. The Solicitor General also suggests that "there is a substantial question" whether the Fourth Circuit had jurisdiction to hear this case. SG Br. 15. The Solicitor General does not explain how this case is any different from *New York v. FERC*, 535 U.S. at

15-16, in which this Court considered a state's pre-enforcement challenge to a FERC order construing the Federal Power Act. But, relying on this Court's recent decision in *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009), the Solicitor General contends that respondents failed to establish standing to challenge FERC's order construing Section 216 (or, alternatively, that FERC's construction was not ripe for judicial review). SG Br. 17-18.[2]

To the extent the Solicitor General raises legitimate concerns, the proper course would not be to deny *certiorari* but rather to grant the petition for *certiorari* and add an additional question presented, directing the parties to brief whether the Fourth Circuit had jurisdiction over the case. *See, e.g., Powerex Corp. v. Reliant Energy Servs.*, 549 U.S. 1178 (2007) (adding jurisdictional question to grant of *certiorari*); *Kansas v. Marsh*, 544 U.S. 1060 (2005) (same); *Castro v. U.S.*, 537 U.S. 1170 (2003) (same). Suffice it to say that it would be news to the energy bar – and presumably to other administrative lawyers as well – to learn that cases of this sort are nonjusticiable. *See, e.g., Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) ("[P]re-enforcement review of agency rules and regulations has become the norm, not the

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[2] The Solicitor General also notes that FERC's interpretation of Section 216 is set forth in a "preamble issued as part of a rulemaking," not a regulation. SG Br. 15. But this has no relevance to any jurisdictional or legal issue here. As the Solicitor General herself explains, FERC's interpretation represents its "authoritative construction of a statute the agency is charged with administering." SG Br. 7.

exception."). If pre-enforcement challenges are no longer viable, this Court should say so, after taking into account the impacts of such a change on orderly agency implementation of statutes and on the regulated community that is bound by agency rules.

At the very least, this Court should grant the petition and vacate and remand (GVR) the Fourth Circuit's decision for consideration of this issue. The *Summers* decision, upon which the Solicitor General's jurisdictional argument rests, was decided in March of 2009, the month *after* the Fourth Circuit decided this case (on February 18, 2009). Pet. App. 5a. Accordingly, if the Solicitor General's jurisdictional argument has merit, the scenario she describes would fall squarely within this Court's GVR authority, which applies when new authority from this Court "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

In short, it would be not only ironic, but unjust and quite harmful to national energy policy, if this Court allowed the Fourth Circuit's decision to stand on the ground that new authority calls into question that court's very exercise of jurisdiction. This Court can, and should, avoid such an outcome.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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IN THE
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EDISON ELECTRIC INSTITUTE, ET AL.,
Petitioners,

v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations, represent-

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made such a monetary contribution. This brief is filed with the consent of all the parties. Counsel for *amicus* gave notice to all parties at least 10 days prior to filing, as required by rule.

ing 300,000 direct members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographical region of the country. An important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business. In that capacity, the Chamber has participated in hundreds of cases before this Court, including many involving energy issues. *See, e.g.*, *Graham County Soil & Water Conservation Dist.* v. *United States*, No. 08-304 (cert. granted June 22, 2009); *Entergy Corp.* v. *Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

This is a paradigmatic case of national concern. It goes almost without saying that "[t]he economic significance of electricity is staggering," and that "[e]conomic prosperity, national security, and public health and safety cannot be achieved without it." U.S. Department of Energy, *Overview of the Electric Grid* ("*DOE Electric Grid Overview*").[2] The ever-growing importance of electricity is reflected in the recent national focus on next-generation technologies to generate more and more power, and indeed the Chamber has worked to advance those technologies by advocating for the regulatory approval of "green" energy projects.[3] But generation capacity alone is not enough. If power cannot be shipped from its point of origin to the location where it is needed—in other words, if transmission bottlenecks block the free flow of electricity like a dam on a river—then

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[2] *Available at* http://sites.energetics.com/gridworks/grid.html (last checked Oct. 16, 2009).

[3] *See* U.S. Chamber of Commerce, *Project No Project* Website (describing the Chamber's advocacy on these issues), *available at* http://pnp.uschamber.com (last checked Oct. 18, 2009).

the power might as well not have been generated in the first place. All the nuclear, solar, wind, and other cutting-edge power-generation techniques in the world will be of little use if the national transmission grid is not up to par.

Recognizing as much, Congress took steps in the Energy Policy Act of 2005 (the "Act") to alleviate one of the primary causes of transmission bottlenecks: inefficiencies in the regulatory approval process for new transmission lines. Section 1221 of the Act—codified in relevant part as Section 216 of the Federal Power Act, 16 U.S.C. § 824p ("Section 216")—empowered the Department of Energy to designate regions of the country with the most serious bottlenecks. 16 U.S.C. § 824p(a). In those designated regions, the Federal Energy Regulatory Commission ("FERC") may approve the siting of new transmission facilities if the state cannot or will not do so. *Id.* § 824p(b). This "backstop" siting authority is crucial to ensuring that the nation's transmission grid keeps pace with its generation capacity. *See* U.S. Chamber of Commerce, Institute for 21st Century Energy, *Blueprint for Securing America's Energy Future* 48-49 (Sept. 2008)[4] (observing that "[b]lackouts, brownouts, service interruptions, and rationing could become commonplace without new and upgraded [transmission] capacity" and calling for Congress to "simplify siting for electric transmission facilities" by giving FERC expanded siting authority).

A two-judge panel majority has now substantially hamstrung the backstop siting authority granted

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[4] *Available at* http://energyxxi.org/reports/Blue_Print.pdf (last checked Oct. 20, 2009).

FERC by the Act—and it has done so on review of consolidated petitions from multiple circuits, meaning its interpretation would be the last word absent this Court's review. The panel majority ruled that the phrase "withheld approval for more than 1 year"—one of the state regulatory acts that triggers FERC backstop authority under Section 216—encompasses only *delays* in permitting, not timely refusals to issue a permit. Pet. App. 33a. But if a state regulator can block any new transmission facility by merely issuing a timely denial, no matter how important the facility would be to the broader electrical grid, and no matter the regulator's reason, then FERC's backstop authority will do little to advance its intended purpose: "to facilitate the process of siting critical regional transmission lines and facilities [and] ensuring adequate capacity and increased reliability on the electric transmission grid." Pet. App. 257a.

This is, in short, a singularly important case. Because electricity is the lifeblood of modern business, and because the decision below "significantly curtails FERC's ability to address critical infrastructure deficiencies," Pet. of Resp't Fed. Energy Regulatory Comm'n for Reh'g En Banc at 3, *Piedmont Envtl. Council* v. *FERC*, No. 07-1651 (4th Cir. Apr. 2, 2009), the Chamber has a substantial interest in seeing this Court grant the writ and reverse the decision of the Fourth Circuit.

ARGUMENT

I. AN EFFICIENT ELECTRICAL TRANSMISSION GRID IS CRUCIAL TO THE CONTINUED VITALITY OF THE U.S. ECONOMY.

1. Electrical power is, of course, essential to modern business, and growing more so every day. Electricity demand in the United States has increased by about 25 percent since 1990, *see DOE Electric Grid Overview*, and is projected to grow 26 percent more by 2030. *See* Energy Information Administration, *Annual Energy Outlook 2009*, DOE/EIA-0383 at 71 (Mar. 2009) ("*Annual Energy Outlook*").[5] Much of that demand stems from "an economy relentlessly grown digital." U.S. Department of Energy, *The Smart Grid: An Introduction* at 8 (2008) ("*The Smart Grid*").[6] In the 1980s, computerized systems and appliances and automated manufacturing consumed only a tiny fraction of the nation's electricity; that share has risen to 40 percent today, and "is expected to increase to more than 60 percent by 2015." *Id.*; *see also Annual Energy Outlook* at 65 (finding that growing demand is fueled by "commercial establishments, which increasingly depend on * * * electronic office equipment" as well as by "demand for * * * electricity to power medical and monitoring equipment" at health-care facilities).

Put another way, modern technology will soon account for well over half of American electricity use—

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[5] *Available at* http://www.eia.doe.gov/oiaf/aeo/pdf/0383(2009).pdf (last checked Oct. 16, 2009).

[6] *Available at* http://www.oe.energy.gov/SmartGridIntroduction.htm (last checked Oct. 16, 2009).

and the lion's share of that technology is deployed by business. "The 'information economy' requires a reliable, secure, and affordable electric system to grow and prosper." *DOE Electric Grid Overview*. Without such a reliable power supply, America's businesses cannot compete on a global stage.

2. That power supply has not always proven up to the task. "Today's electricity system * * * allows for power outages and interruptions that cost Americans at least *$150 billion each year*—about $500 for every man, woman and child." *The Smart Grid* at 5 (emphasis added). "These costs could soar if outages or disturbances become more frequent or longer in duration." *DOE Electric Grid Overview*. A few examples illustrate the magnitude of loss even short outages can cause: According to the Department of Energy, the Northeast blackout of 2003 cost the region $6 billion; a one-hour outage that hit the Chicago Board of Trade in 2000 delayed $20 trillion in trades; and blackouts cost a single company—Sun Microsystems—$1 million per minute. *The Smart Grid* at 8. Much of the blame for these outages falls to the nation's transmission system, or "grid."

The grid—actually a set of three large regional grids—features more than 200,000 miles of interconnected transmission lines that serve more than 283 million people. *See* U.S.-Canada Power System Outage Task Force, *Final Report on the August 14, 2003 Blackout in the United States & Canada* at 5 (2004).[7] It relies on super-high-voltage transmission over long distances to increase efficiency: Electricity

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[7] *Available at* https://reports.energy.gov/BlackoutFinal-Web.pdf (last checked Oct. 15, 2009).

from generators is "stepped up" to higher voltages for transportation; it flows through the interconnected network of transmission lines to the location where it is needed "along 'paths of least resistance,' in much the same way that water flows through a network of canals." *Id.* at 6. When the power arrives at its destination, it is "stepped down" to lower voltages for distribution to customers. *Id.*

This complex transmission system "is one of the great engineering achievements of the past 100 years," *id.* at 5, but of late it has been allowed to languish. "While electricity demand increased by about 25% since 1990, construction of transmission facilities decreased about 30%," and overall "annual investment in new transmission facilities has declined over the last 25 years." *DOE Electric Grid Overview.* The result is grid "congestion"—the term for the inability of the transmission system to move electricity, efficiently and reliably, from where it is generated to where it is needed.

Grid congestion is a major contributor to the billions of dollars in losses that the system causes each year. "Congested transmission paths, or 'bottlenecks,' now affect many parts of the grid across the country." *Id.* And that means higher electricity costs and higher risk of blackouts. "When a constraint prevents the delivery of a desired level of electricity across a line in real time, system operators must 'redispatch' generation, * * * cut wholesale transactions previously planned to meet customers' energy demand at lower cost, or as a last resort, reduce electricity deliveries to customers." U.S. Department of Energy, *National Electric Transmis-*

sion Congestion Study 3 (Aug. 2006).[8] Put another way, the grid is designed to find the most efficient source of power for a given user and instantly route it from the generation point to that user. When a bottleneck makes that impossible, the user will either pay more to acquire energy in a less efficient way, or will not receive the electricity it needs at all.

The amount of trouble congestion can cause is "related to how heavily the system is loaded," *DOE Electric Grid Overview*, and that load is growing. For example, annual transactions on the Tennessee Valley Authority's transmission system exceed 250,000 today—more than twelve times the level of just over a decade ago. *Id.* And when the grid is asked to handle new loads without additional capacity, breakdowns follow. "Congestion on transmission lines, as more and more power is moved over them, can have a significant impact on reliability." North American Electric Reliability Corp., *2008 Long-Term Reliability Assessment* 17 (2008).[9] That is so not just because a given line is overburdened, but because it is also asked to take on yet more load to make up for overloaded lines elsewhere: "As these lines reach their capacity * * * they are less able to make up the difference when neighboring lines are forced out of service." *Id.* Congestion thus "acts somewhat like cholesterol in the body, causing flows to be constrained, increasing stress on the system, and contributing to the likelihood of a breakdown." ICF

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[8] *Available at* http://nietc.anl.gov/documents/docs/Congestion_Study_2006-9MB.pdf (last checked Oct. 16, 2009).

[9] *Available at* http://www.nerc.com/files/LTRA2008.pdf (last checked Oct. 16, 2009).

Consulting, *The Costs and Benefits of Investing in the US Transmission Grid* 1 (2004).[10]

3. For all of these reasons, "[b]illions of dollars need to be invested in the national transmission grid to ensure reliability and to allow markets to function." S. Rep. No. 109-78 at 8 (2005); *see also* H.R. Rep. No 109-215 at 171 (2005) ("Investment in electric transmission expansions has not kept pace with electricity demand."). Failure to expand the grid, and remove bottlenecks, "could interfere with regional economic development." *DOE Electric Grid Overview*. Yet investment in the transmission infrastructure still is not occurring quickly enough. And Congress has identified, as one of the main factors contributing to the problem, the very issue at the center of this case: the state regulatory approval process for transmission-line siting.

The House Report accompanying the legislation that became the Energy Policy Act of 2005 found that the "state regulatory approval [process] delays siting of new transmission lines by many years." H.R. Rep. No. 109-215 at 171. The Senate likewise found that "[r]egulatory uncertainty" and "a lack of coordination among States" in siting transmission lines "impede the improvement of the electric system." S. Rep. No. 109-78 at 8. *See also DOE Electric Grid Overview* (identifying "jurisdiction and government agency overlap for siting and permitting" as one of the "significant impediments [that] interfere with solving the country's electric transmission problems"); Brian T. Burgess, Note, *Limiting Preemption in Environmental Law: An Analysis of the Cost-Externalization*

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[10] *Available at* http://www.icfi.com/markets/energy/doc_files/us-transmission-grid.pdf (last checked Oct. 16, 2009).

Argument & California Assembly Bill 1493, 84 N.Y.U. L. Rev. 258, 274 (2009) (discussing literature that favors preemption where a state blocks a regionally beneficial project and observing that "the values of federalism cannot include leaving states free to extract costs from nonresidents to the disadvantage of other states and the nation as a whole").

To solve the problem, Congress enacted Section 216. *See* 150 Cong. Rec. S3732 (daily ed. Apr. 5, 2004) (statement of Sen. Domenici) (stating that Section 216 is designed to "streamline the permitting of siting for transmission lines to assure adequate transmission"). That provision authorizes the Department of Energy to designate "National Interest Electric Transmission Corridors"—in other words, regions where grid congestion is particularly bad—and empowers FERC to issue construction permits for transmission facilities in those corridors in situations where a state is unwilling or unable to do so. See 16 U.S.C. § 824p(a)-(b). Congress, in short, gave FERC the power, in limited circumstances,[11] to override state regulators when those regulators erect roadblocks to a regionally or nationally important transmission facility.

FERC correctly recognized that this federal authorization is critical to its ability to break up

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[11] Under the Act, FERC can only issue a permit if (i) the desired transmission facility is located in a National Interest Electric Transmission Corridor and (ii) FERC finds that numerous other statutory requirements are met, including that the facility "will significantly reduce transmission congestion in interstate commerce" and "will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures." 16 U.S.C. § 824p(b)(2)-(6).

transmission bottlenecks—and that its effectiveness will be severely curtailed if a state in a congestion-ridden region can simply say "no" to a reasonable transmission line proposal, without further recourse or consequences. This Court should grant the petition for certiorari to consider whether the Fourth Circuit's interpretation of Section 216 fails to respect Congress' language and intent in adopting that provision. The expansion of this nation's electric transmission capacity is too important to let this case pass.

II. THE DECISION BELOW REPRESENTS A SKEWED APPROACH TO *CHEVRON* DEFERENCE.

Three judges of the Court of Appeals, and before them five FERC Commissioners, have thus far brought to bear their authority to interpret the phrase at the center of this case: "withheld approval for more than 1 year." Of those eight people, five have concluded that the phrase should be read to include outright denials—and indeed Judge Traxler, for his part, concluded that it *must* be so read. *See* Pet. App. 70a (four-Commissioner majority); Pet. App. 34a-35a (Traxler, J., dissenting). That the panel majority not only rejected that conclusion, but in fact held that it is not even a *plausible* reading of the statute, reinforces the need for further review here. The meaning of Section 216 should not be settled by dint of two judges' aggressive resort to *Chevron* step one.

1. Under the familiar *Chevron* formulation, a court reviews an agency's implementation of a federal statute by "ask[ing] first whether 'the intent of Congress is clear' as to 'the precise question at

issue.' " *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998) (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). If the answer is yes, " 'that is the end of the matter,' " but " 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' " *Id.* (quoting *Chevron*, 467 U.S. at 842-843).

Chevron, of course, authorizes gap-filling by the agency—here, FERC—"charged with the Statute's administration." *National Fed'n of Fed. Employees, Local 309* v. *Department of Interior*, 526 U.S. 86, 91 (1999). But *Chevron*'s assignment of such interstitial power to agencies creates for the judiciary "incentives against recognizing ambiguity": A judge who disagrees with an agency's statutory interpretation, but thinks it would survive the deference due at *Chevron* step two, may feel "pressure to * * * thrust uncomfortable certainties upon ambiguous text." Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 McGeorge L. Rev. 977, 1005 (2008); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 977 (1992). The majority ruling below is a useful exhibit to that theorem. The panel majority should have concluded, as FERC did, that the phrase "withheld approval for more than 1 year" naturally includes denials. But even if the majority disagreed with FERC on that point, it should have recognized that the phrase is at least ambiguous. At that point it should have deferred to FERC's interpretation. After all, "[u]nder Chevron Step I, a court is entitled to supplant an agency's interpretation

only where Congress clearly intended another interpretation[.]" *Central States Motor Freight Bur., Inc.* v. *I.C.C.*, 924 F.2d 1099, 1104 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (quotation marks omitted). And it cannot fairly be said that Congress "clearly intended" only the meaning assigned by the majority below.

2. That is so first and foremost because it is quite acceptable, in common parlance, to say that approval has been "withheld" in any circumstance where it has not been granted, regardless of the mechanism by which the withholding occurs. *See* Pet. 15. Petitioners offered a compelling example in their briefing below: As they correctly observed, countless contracts (and statutes) provide that approval or consent may not be "unreasonably withheld," and that provision "routinely is interpreted to include not only the failure to consent but also the outright denial of consent." Br. of Petitioners 17, *Piedmont Env'tl Council* v. *Edison Elec. Inst.*, No. 07-1651 (4th Cir. Jan. 8, 2008) (citing cases).

But in this case, there is more to go on even than compelling arguments by analogy; in this case, a majority of the judges and regulators who have authoritatively interpreted the phrase have concluded that it is best read to bear a different meaning than the one the panel majority concluded was inescapable. This Court has explained that such disagreements cut convincingly in favor of the conclusion that statutory text is at least ambiguous. In *Smiley* v. *Citibank*, 517 U.S. 735, 739 (1996), for instance, the Court concluded in light of a dissent from the opinion on review, and the existence of another judicial opinion taking the opposite view of the statute, that "it would be difficult indeed to

contend that the word 'interest' * * * is unambiguous." And in *National Federation*, 526 U.S. at 98, the Court reversed the Fourth Circuit's rejection of an agency interpretation at *Chevron* step one, and in so doing observed that the D.C. Circuit has reached a "similarly absolute, but opposite, reading." That approach makes sense. After all, it would be the rare case where multiple experienced regulators and judges all assign to a phrase a meaning that it cannot reasonably bear.

FERC's resolution of the interpretive question, in short, was either clearly correct or at the least entitled to deference. The Fourth Circuit's contrary conclusion was error—and because that court was adjudicating multiple consolidated petitions for review, no other circuit will have the opportunity to weigh in on the matter. This Court should grant the writ to review the Fourth Circuit's application of *Chevron* in this case with ramifications for businesses across the country.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
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EDISON ELECTRIC INSTITUTE, *ET AL.*
v.
PIEDMONT ENVIRONMENTAL COUNCIL, *ET AL.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE HONORABLE JOSEPH T. KELLIHER, ELIZABETH ANNE MOLER, PATRICK HENRY WOOD III, AND JAMES J. HOECKER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF *AMICI CURIAE* THE HONORABLE JOSEPH T. KELLIHER, ELIZABETH ANNE MOLER, PATRICK HENRY WOOD III, AND JAMES J. HOECKER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

The *amici*[1] are former chairmen of the Federal Energy Regulatory Commission (FERC), the principal regulator of the bulk power industry of the United States. The *amici* collectively served in that capacity during 1993-2009. During this period, Congress considered legislation to establish effective federal transmission siting authority, resulting in enactment of section 216 of the Federal Power Act, and FERC issued final rules implementing its new siting authority, the rules reviewed by the Fourth Circuit. The *amici* have been responsible for the regulatory initiatives and responses to Congressional directives identified in this brief and have testified before Congress on transmission policy matters in their former official capacity. They have also participated in legislative consideration of federal transmission

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[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution towards the preparation or submission of this brief; no person made a monetary contribution towards the preparation or submission of this brief other than the *amici curiae* and their counsel, and FPL Group, Inc., which contributed printing costs. All parties have consented to the filing of this brief in letters filed with the Clerk.

legislation. The *amici* are experts on transmission policy matters, collectively have decades of experience on energy policy, and offer an informed perspective on the policy consequences of the Fourth Circuit's decision. The *amici* are all participating in their individual capacities.

SUMMARY OF ARGUMENT

This case involves a matter of pervasive national interest. The Fourth Circuit decision nullifies the intent of Congress to strengthen the interstate electric transmission system. It undermines two decades of national policy designed to promote wholesale competition across the increasingly stressed interstate grid. It also hinders the expansion of transmission that is critical to the development of renewable resources like wind and solar power.

The nation's transmission system is aging, does not adequately serve major renewable resources where they exist in abundance, and is inadequate to meet the needs of the digital age and growing demands for reliable electric power. Although states remain the initial arbiters of which transmission projects can be built, only federal authority can guarantee that facilities that serve the needs of competitive wholesale markets and customers across a region can be sited on the basis of the broad public interest.

This case is about whether an individual state should be empowered to veto critical interstate transmission projects, contrary to the statutory

scheme adopted by Congress. It is about sacrificing a key building block in the edifice of national competitive electric policies that have emerged with the support of several Congresses, four Administrations, and numerous major regulatory orders over a quarter century, including those to create transmission open access and to encourage regional transmission organizations. We respectfully urge the Court to review the decision below.

The federal siting provisions of the bipartisan Energy Policy Act of 2005 mark the first time in 70 years that Congress reconsidered its decision in 1935 to leave siting of interstate electric transmission facilities in the hands of state and local governments. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221 (2005) (codified at 16 U.S.C. § 824p (2008)). Over those seven decades, electricity delivery and power markets had fundamentally changed. What was once a host of individual local delivery systems had evolved to large interstate and even international grids. Markets that were once local and noncompetitive evolved into robust competitive interstate wholesale markets. *New York v. FERC*, 535 U.S. 1, 7-8 (2002).

Congress recognized these changes and enacted section 216 of the Federal Power Act, which provides for federal siting of electric transmission facilities, under specific circumstances, in "national interest electric transmission corridors." 16 U.S.C. § 824p (2008). That provision was preemptive, but not exclusive, since it allowed state and local governments to continue to site transmission facilities. Section 216 is part of a comprehensive federal scheme to set and

enforce grid reliability standards, assure open transmission access and encourage grid investment, building upon reforms undertaken by FERC to ensure a transmission system adequate to the needs of the 21st century.

Against this backdrop, the Fourth Circuit justifies a restrictive interpretation of section 216 by asserting that the problem Congress was trying to solve was state inaction, and imposition of "project-killing conditions." *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 314-15 (4th Cir. 2009). This conclusion is based on speculation and inferences drawn by the court from the statutory language rather than resort to the legislative history. A review of the legislative history of section 216 reveals that Congress was indeed concerned not only about state siting delays but also about state denials of transmission siting approval, and fully intended to preempt states and allow federal transmission siting where states had denied approval.

The result of the Fourth Circuit decision is nullification of the comprehensive statutory scheme erected by Congress with respect to U.S. transmission policy. The goal of Congress was to strengthen the interstate power grid to support competitive markets, assure reliability, and promote development of renewable energy capacity. Congress recognized that development of large interstate transmission projects is necessary to accomplish those policy goals, and also appreciated that state and local siting is poorly suited for development of such projects. For that reason, Congress provided for federal transmission siting.

By enacting the first change in transmission siting law in 70 years on a bipartisan basis, Congress intended to change the status quo and provide for siting decisions that reflect a national or regional perspective, rather than single state parochial views. The Fourth Circuit decision serves largely to restore the status quo ante, by vitiating federal siting authority in an area that was of great interest to Congress – where states have rejected transmission projects. The Fourth Circuit decision frustrates the will of Congress.

While federal regulation indisputably extends to the use of the interstate electric transmission system and to ensuring reliability of the grid, the Fourth Circuit has interpreted Congress' intent as maintaining each state's veto authority over new interstate electric transmission facilities no matter how vital to the national interest. Indeed, this is held by the Fourth Circuit to be Congress' intent even where the subject facilities are in "a national interest electric transmission corridor" important to economic growth and vitality, electricity supply diversification, energy independence, and national defense and homeland security. Federal Power Act § 216(a), 16 U.S.C. § 824p(a) (2008).

ARGUMENT

I. EFFECTIVE FEDERAL TRANSMISSION SITING IS IN THE NATIONAL INTEREST.

A. The National Interest in the Interstate Transmission System Has Evolved.

When the principal federal electricity law, the Federal Power Act, was passed, the U.S. could not fairly be said to have had an interstate grid. *New York,* 535 U.S. at 5. Over the intervening 75 years, however, as technology for long-distance transmission improved and isolated electric systems were interconnected, what once was a series of local delivery networks became an interstate grid. *Id.* at 1. Today's grid is not only interstate but international, since the U.S. transmission system is fully interconnected with Canada and part of Mexico. Because the grid in the Lower 48 is interstate, any transmission facility attached to the interstate grid is interstate, even if it does not cross a state line. *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972).

The interstate transmission system is now vital to three areas of great national interest. First, the transmission grid supports competitive markets, by removing constraints that result in higher prices and greater price volatility. The federal role with respect to interstate transmission established by the Energy Policy Act of 2005 is only the latest in a series of important statutory and regulatory reforms that Congress and FERC have undertaken to promote wholesale competition through transmission open

access.[2] The Energy Policy Act of 2005 is a natural extension of these past reforms and recognizes that the competitive benefits of transmission open access will be limited if the grid itself is constrained.

This Court has recognized the relationship between greater competition and the evolution of the transmission grid:

> In recent decades, the Commission has undertaken an ambitious program of market-based reforms. Part of the impetus for those changes was technological evolution. Historically, electric utilities had been vertically

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[2] The Energy Policy Act of 1992, Pub. L. No. 102-486, permitted the creation of new entities, "exempt wholesale generators," that could generate and sell electricity at wholesale without being regulated as public utilities. FERC Order No. 888 sought to eliminate undue discrimination in the provision of transmission service by requiring that each public utility with transmission facilities offer unbundled transmission service pursuant to a standard Open Access Transmission Tariff (*pro forma* OATT). *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). FERC Order No. 2000 encouraged utilities to voluntarily join independent regional transmission organizations that would operate their transmission facilities on a non-discriminatory basis and administer the OATT. *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (2000), FERC Stats. & Regs. ¶ 31,089 (1999), *aff'd sub nom. Public Util. Dist. No. 1 of Snohomish Cty v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

> integrated monopolies. For a particular geographic area, a single utility would control the generation of electricity, its transmission, and its distribution to consumers. Since the 1970's, however, engineering innovations have lowered the cost of generating electricity and transmitting it over long distances, enabling new entrants to challenge the regional generating monopolies of traditional utilities.
>
> To take advantage of these changes, the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity. It has sought to promote competition in those areas of the industry amenable to competition, such as the segment that generates electric power, while ensuring that the segment of the industry characterized by natural monopoly—namely, the transmission grid that conveys the generated electricity—cannot exert monopolistic influence over other areas.

Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty, 554 U.S. __, 128 S. Ct. 2733, 2740 (2008) (internal citations omitted).

Second, the transmission grid supports reliability. In the years leading up to enactment of the Energy Policy Act of 2005, the U.S. had experienced eight large regional blackouts, including the largest

blackout in U.S. history in August 2003.[3] In the Act, Congress sought to help avoid future such events by enacting the siting provisions at issue here, as well as a comprehensive federal program of mandatory reliability standards. Energy Policy Act § 1211.

Third, the transmission grid is necessary to promote development of renewable energy resources, which tend to be concentrated in areas remote from the current interstate grid. This matter was important to Congress in 2005, and, as discussed in detail in the next section, it has become even more important as national energy and environmental policies lead the country to develop clean energy supplies. U.S. Dep't of Energy, National Transmission Grid Study xi, 4, 10, 19-21 (2002); U.S. Dep't of Energy, 20% Wind Energy By 2030 93, 100 (2008) (hereinafter "Wind Energy Study").

Congress recognized the vital national interest that transmission serves and understandably decided to end the states' exclusive role in siting transmission facilities so that the national interest could be protected when necessary.

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[3] U.S.-Canada Power System Outage Task Force, Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations, Chapter 7 (2004).

B. Effective Federal Transmission Siting Is Essential to a National Clean Energy Policy.

The United States Government is in the process of implementing a new energy and environmental policy designed to sharply reduce carbon emissions from electric generation facilities and other sources, while assuring adequate electricity supply at a reasonable cost.[4] This reduction will be accomplished in large part by changing U.S. electricity supply away from use

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[4] President's Remarks on Energy Legislation, Daily Comp. Pres. Doc. (June 26, 2009), *available at* http://www.gpoaccess.gov/presdocs/2009/DCPD-200900513.pdf; Statement of Administration Policy on H.R. 2454, American Clean Energy and Security Act of 2009, Executive Office of the President, Office of Management and Budget (June 26, 2009), *available at* http://www.whitehouse.gov/omb/assets/sap_111/saphr2454h_20090626.pdf; Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1); Proposed Rulemaking to Establish Light Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86 and 600); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. ___ (proposed Sept. 30, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71); Mandatory Reporting of Greenhouse Gases, 40 C.F.R. pts. 86, 87, 89, 90, 94, 98, 1033, 1039, 1042, 1045, 1048, 1061, 1054, 1065 (2009); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 311 (2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. tit. I (2009).

of fossil fuels, in part by technology deployment, in part by other means.[5]

If the U.S. electricity supply is going to change, the grid must also change, since the grid is merely a delivery system. The central challenge facing U.S. transmission policy now is the need to develop a clean energy grid that can efficiently deliver an entirely different electricity supply across regional power markets.

Renewable energy or clean energy potential is not evenly distributed in the United States, and some regions have a much greater endowment than others. Wind Energy Study at 24. This is illustrated by a map of solar and wind resources prepared by the National Commission on Energy Policy, Ending the Energy Stalemate, Table 4-14 (2004):

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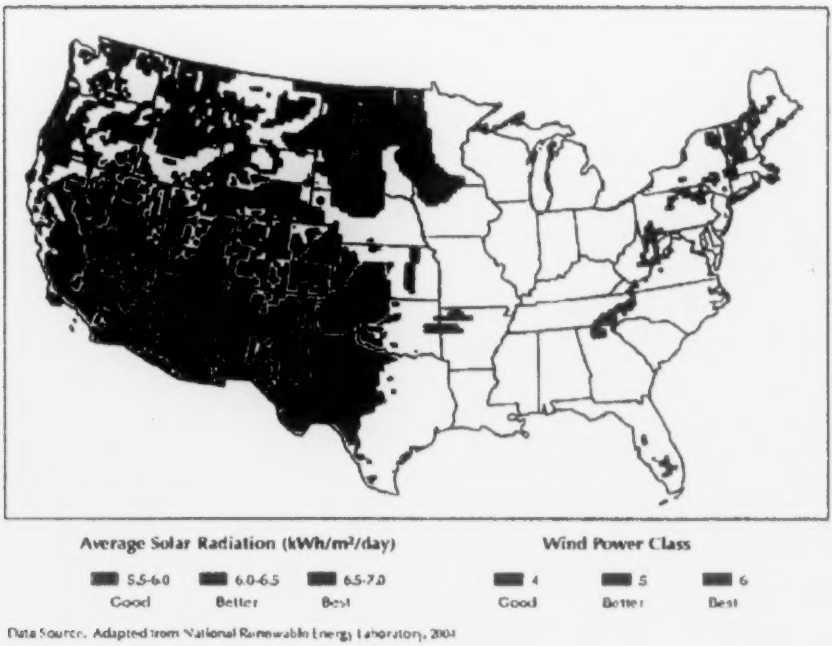
[5] U.S. Energy Info. Admin., Energy Market and Economic Impacts Of H R. 2454, The American Clean Energy and Security Act of 2009 ix (2009); Electric Power Research Inst., Creating Our Future: Meeting The Electricity Technology Challenge 20 (2009), *available at* http://mydocs.epri.com/docs/SummerSeminar09/Specker09SumSem.pdf; McKinsey & Co., Reducing U.S. Greenhouse Gas Emissions: How Much at What Cost? xv, 58-66 (2007).



Regions with the greatest natural endowment of renewable energy potential tend to be remote from the interstate power grid, isolated by transmission constraints. Wind Energy Study at 75. Maximizing U.S. renewable energy supplies is a core element of clean energy and environmental policy. *Id.* at 13-14, 107; Midwest Independent Transmission System Operator, Inc., *et al.*, Joint Coordinated System Plan '08 at 7.

If the United States is going to maximize its renewable energy supply, it must build out a clean energy grid and remove those constraints. Wind Energy Study at 2, 10-12, 93, 95-98; Joint Coordinated System Plan '08 at 4-9. Effective federal siting of transmission facilities is necessary to develop that grid in the timeframe envisioned by carbon policy.

National carbon and clean energy policy, expressed in pending legislation and regulatory orders issued by the U.S. Environmental Protection Agency (EPA), envisions significant reductions of carbon emissions beginning as soon as 2012.[6] Significantly, EPA has initiated a series of actions to implement this new national policy,[7] and legislation has advanced in Congress.[8]

There are important policy consequences to continued reliance on state and local transmission siting procedures and the lack of effective federal transmission siting. It means the U.S. will expand grid capacity at a much slower rate than would be possible under federal transmission siting. It means development of the highest-quality, low-cost renewable energy potential in regions remote from the grid will be forestalled or postponed. It also means the change in U.S. electricity supply will occur much more slowly than would be possible under federal siting.

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[6] American Clean Energy and Security Act of 2009 § 311; Clean Energy Jobs and American Power Act tit. I; Proposed Rulemaking to Establish Light Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454, 49460 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86 and 600).

[7] *See supra* note 4.

[8] The U.S. House of Representatives passed H.R. 2454, *supra* note 4, on June 26, 2009, and bills are pending in the Senate.

C. State and Local Siting of Interstate Transmission Facilities Has Proven Inadequate to Meet the Evolving Need.

Until enactment of the Energy Policy Act of 2005, the United States sited electric transmission facilities under a 1935 statute that reflected the nature of the grid as it was at the time, relying on state and local siting of privately owned transmission lines. *Piedmont,* 558 F.3d at 310. In 1935, electricity delivery was essentially local in nature, and it is thus not surprising that the Federal Power Act did not provide for federal transmission siting by the Federal Power Commission, the predecessor agency to the FERC. Instead, Congress reserved siting of transmission facilities to the states. Federal Power Act § 201, 16 U.S.C. § 823c (2008). State siting authorities and policies vary substantially, with some states vesting sole authority in a single state agency or public utility commission while others delegate it to a host of affected local governments. Nat'l Council on Elec. Policy, Electricity Transmission: A Primer 11 (2004).

State and local siting can be an efficient way to site certain transmission facilities, particularly smaller single state projects that benefit the siting state. National Transmission Grid Study at E-7, E-42. But state and local siting is poorly designed to site large interstate transmission projects whose benefits extend to an entire region or the nation. *Id.* at 53, E-42; Wind Energy Study at 99. However, it is precisely this category of transmission project that needs to be built to meet national energy and environmental policy

goals, including supporting competitive markets, by removing constraints that result in higher prices and greater price volatility, assuring grid reliability, and maximizing renewable energy development. National Transmission Grid Study at 58; Midwest Independent Transmission System Operator, Inc., *et al.*, Joint Coordinated System Plan '08, 7, 9 (2008).

There are two principal problems with state and local siting of large interstate transmission projects. First, state and local transmission siting proceedings of large projects take too long, especially when approval is needed from multiple jurisdictions. It can take more than ten years to obtain siting approval for transmission projects that cross multiple states. For example, the Jacksons Ferry transmission line between Virginia and West Virginia, involving two state commissions and a federal land agency, took 13 years to site, and less than three years to construct. That is true even though the project was recognized as critical to the reliability of the Eastern grid. U.S. Dep't of Energy, Electric Power Outages in the Western United States, July 2-3, 1996, 82, 85 (1996).

The great length of the transmission siting process is a particular problem for renewable energy projects such as wind and solar farms. Renewable resources are typically located in remote areas of the country.[9] Renewable projects can be built quickly, but are unlikely to be built in locations where they lack access

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[9] Wind Energy Study at 75.

to an unconstrained interstate power grid and would face unpredictable curtailments that interrupt sales.

One way to demonstrate the failure of state and local transmission siting of large interstate transmission projects is to contrast it with what is possible under federal siting of interstate natural gas pipelines, where federal siting authority is exclusive and preemptive.[10] In recent years FERC has sited thousands of miles of interstate natural gas pipelines,[11] while states have sited very little multi-state electric transmission lines.[12] Furthermore, it is possible to site very large interstate natural gas pipelines in a matter of months, while it can take years for states to site much smaller electric

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[10] Natural Gas Act § 7(h), 15 U.S.C. § 717f (h) (2008). The original Natural Gas Act also reserved siting of interstate natural gas pipelines to the states. But in 1947 Congress concluded that reliance on state and local siting of these interstate facilities had failed and amended the Act to provide for exclusive and preemptive federal siting. Natural Gas Act Amendments of 1947, Pub. L. No. 80-245, 61 Stat. 459 (1947).

[11] Between 1997 and 2002, FERC sited 9,316 miles of interstate natural gas pipelines. Fed. Energy Regulatory Comm'n, Approved Pipeline Projects (2009), *available at* http://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp.

[12] Between 2000 and 2007, states sited 668 miles of cross-border lines 230 kV and higher. Fed. Energy Regulatory Comm'n, Electric Transmission Siting, presentation (2007), slide 2, *available at* http://www.ferc.gov/industries/electric/indus-act/siting/trans-siting-present.pdf.

transmission facilities.[13] Large natural gas pipelines can be conceived, proposed, sited, constructed, and begin operation in 2-3 years,[14] while those steps can take 10 years or longer for electric transmission facilities of comparable size.

The second problem with state and local transmission siting is that siting large interstate transmission projects necessarily involves balancing local impacts against regional benefits, and state and local officials cannot be expected to adequately weigh regional or national benefits. The duty of a state or local official is to a single state or local government, not to a region or the nation. Prior state siting decisions reflect an inability or unwillingness by state and local officials to properly weigh benefits to neighboring states in siting decisions.[15]

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[13] Rockies Express Pipeline–West, which crosses five states and exceeded 700 miles, was sited by FERC in 11 months, and the MidContinent pipeline, which crossed five states and exceeded 500 miles, was sited by FERC in 9 months. *See supra* note 11. As noted above, siting the Jacksons Ferry transmission line, which crossed two states and was only 90 miles long, took 13 years.

[14] Rockies Express Pipeline–West took less than 3 years from conception to operation. Rockies Express Pipeline – West, *available at* http://www.rexpipeline.com/index_west.html.

[15] *See e.g.*, Arizona Corp. Comm., *In the Matter of Southern California Edison Co.*, Docket No. L-00000A-06-0295-00130, Decision No. 69638 (June 6, 2007), *available at* http://images.edocket.azcc.gov/docketpdf/0000073735.pdf (denying power line certificate in part because primary beneficiary would be California); Connecticut Siting Council, *TransÉnergie U.S. Ltd.*, Docket No. 197, Opinion (March 28, 2001), *available at*

Even if there are countervailing regional benefits, the narrow focus of state and local review remains local impacts. In the face of this lopsided balancing, electric transmission projects may be abandoned or withdrawn early in the process, anticipating that siting approval had become a Sisyphean task. A prominent characteristic of state and local transmission siting is its sheer unpredictability with respect to length of state and local siting review, the likelihood of success, and the influence of political considerations on state and local siting decisions. That stands in sharp contrast with the predictability of the FERC natural gas pipeline siting process.

Congress recognized the problems associated with state and local siting of interstate transmission facilities, which is why the law was changed in 2005. The federal role established in the Energy Policy Act of 2005 was manifestly preemptive, but not exclusive. Even the Fourth Circuit recognized the federal siting provisions of the Energy Policy Act of 2005 were preemptive. *Piedmont*, 558 F.3d at 313. The only debate is regarding the scope of federal preemption intended by Congress.

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http://www.ct.gov/csc/cwp/view.asp?a=958&Q=247616 (denying power line certificate in part because primary beneficiary would be New York).

II. CONGRESS INTENDED TO GRANT FERC SITING AUTHORITY WHERE STATES HAVE DENIED PROJECT APPROVAL.

A. National Energy Policy Identified State Rejection of Siting Approval as a National Problem and Proposed Federal Preemption.

It is not a simple matter to mark the beginning of a legislative process that resulted in enactment of new law. However, the legislative history of the federal transmission siting provisions of the Energy Policy Act of 2005 can be traced back to May 2001. It was on May 16, 2001 that the Bush Administration issued the National Energy Policy proposal in part to modernize our energy infrastructure. Nat'l Energy Policy Dev. Group, National Energy Policy at xi (May 16, 2001). The National Energy Policy proposed a series of electricity legislative reforms that resulted in the electricity provisions in the Energy Policy Act of 2005. *Id.* at 5-21, 7-17.

One of the most important policy proposals in the National Energy Policy was the recommendation that the President direct the Secretary of Energy to "develop legislation to grant authority to obtain rights-of-way for electricity transmission lines, with the goal of creating a reliable national transmission grid. Similar authority already exists for natural gas pipelines in recognition of their role in interstate commerce." *Id.* at 7-17. This recommendation began the first serious legislative effort to change the siting process for electric transmission since the 1930s, and

led to enactment of the federal siting provisions of the Energy Policy Act of 2005.

The National Energy Policy also identified state and local transmission siting as a causal factor in the development of constraints in the power grid. *Id.* at 7-7. Importantly, the National Energy Policy specifically identified state *rejections* of transmission projects as a causal factor in transmission constraints, specifically citing state rejection of a proposed line between Connecticut and Long Island[16] and identifying state rejections of proposed transmission projects as a problem to be remedied by federal legislation.[17]

The express reference to the natural gas pipeline statutory model in the National Energy Policy, the discussion of state rejections of siting approvals as a causal factor in grid constraints, and the proposal for federal legislation to establish effective federal siting authority modeled on the preemptive natural gas siting model, all demonstrate that preempting state rejections of siting approvals was an objective of federal transmission siting legislation from the very

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[16] National Energy Policy at 7-7 ("State decisions on where to locate transmission lines often do not recognize the importance of proposed transmission facilities to the interstate grid. For example, a recent decision by regulators in Connecticut to *block* a proposed transmission line to Long Island did not recognize the need for electricity on Long Island.") (emphasis added).

[17] *Id.* ("Some state siting laws require that the benefits of a proposed transmission facility accrue to the individual state, resulting in the *rejection* of transmission proposals that benefit an entire region, rather than a single state.") (emphasis added).

beginning of the legislative process that led to enactment of the Energy Policy Act of 2005.

B. Legislative History Manifests Congressional Intent to Grant FERC Authority to Site Transmission When States Have Denied Approval.

Altogether, Congressional consideration of legislation based on the National Energy Policy proposal that resulted in the Energy Policy Act of 2005 took about four years and spanned three Congresses. Congressional intent with respect to the grant of federal transmission siting authority is made plain through a review of the relevant legislative history. Federal transmission siting legislation took two forms during this period. From December 2001 until June 2004, the relevant legislative provisions authorized FERC to site transmission when a state has "withheld approval" or has "delayed final approval for more than 1 year after the filing of an application seeking approval."[18] From June 2004 through enactment of the Energy Policy Act of 2005, the legislation used the final form that is in section 216 as enacted, namely authorizing FERC siting where a state "withheld approval for more than 1 year after the filing of an application."[19] Unfortunately, the Fourth Circuit

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[18] H.R. 3406, 107th Cong. § 402 (2001); H.R. 6, 108th Cong. § 16012 (2003); H.R. 1644, 108th Cong. § 7012 (2003).

[19] H.R. 4503, 108th Cong. § 1221(a) (2004); S. 2095, 108th Cong. § 1221(a) (2004); H.R. 6, 109th Cong. § 1221(a) (2005).

ignored the first part of the legislative history of the federal transmission siting provisions of the Energy Policy Act of 2005, and based its conclusions regarding Congressional intent on an incomplete legislative history.

In the wake of the National Energy Policy, the Bush Administration sent its legislative recommendations for electricity legislation to Congress, including a recommendation for federal transmission siting authority both where a state "withholds approval, conditions approval to make a project economically infeasible, or delays approval."[20] Legislation was introduced shortly thereafter that closely mirrored that Bush Administration recommendation.[21] That bill was the first legislative step in the process that led to the Energy Policy Act of 2005. Significantly, that bill included federal transmission siting provisions that authorized FERC to site transmission where a state "has *withheld approval*, conditioned its approval in such a manner that the proposed construction or modification is not economically feasible, or *delayed final approval* for more than one year after the filing of an application seeking approval."[22]

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[20] Letter from the Honorable Dan Brouillette, Assistant Sec'y of Energy for Congressional and Intergovernmental Affairs, U.S. Dep't of Energy, to The Honorable Jeff Bingaman, Chairman, S. Comm. on Energy and Natural Resources 2 (Oct. 9, 2001).

[21] Electric Supply and Transmission Act, H.R. 3406, 107th Cong. § 402 (2001).

[22] *Id.* § 402 (emphasis added).

It is important to note that this initial bill distinguished between "withholding approval" and "delaying final approval," which is at the heart of the dispute in *Piedmont*. There are three important conclusions that must be drawn by comparing this legislation to section 216. First, in this context, "withholding approval" must mean something different than "delaying final approval," or the bill would not have provided separate authorizations. Second, "withholding approval" in this context must mean denial of approval, rather than "delaying final approval," otherwise authorizing federal siting where states "delayed final approval" would be superfluous. Third, the authorization for FERC to site transmission where a state has "withheld approval" was not limited to a one-year period. That time limitation applied only to "delaying final approval."

Congress held hearings on this bill, and clearly understood the meaning of these terms.[23] Specifically, the scope of federal preemption under the original version of the legislation, and whether the legislation authorized FERC to site transmission in the face of state denials, was discussed at the Congressional

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[23] *Electric Supply and Transmission Act of 2001, Hearings Before the H. Comm. on Energy and Committee, Sub. on Energy and Air Quality*, 107th Cong. 4-5, 8, 18, 32, 39, 43, 56-7, 78-80, 115-16, 122-23, 124, 133 (statements of Reps. Boucher, Shimkus, Sawyer, Wilson, Bryant, Barton) (2001).

hearings.[24] Statements made by subcommittee members indicate they understood the "withheld approval" language would authorize FERC to site transmission even where states had *rejected* transmission projects.[25] One subcommittee member stated the siting language would allow FERC to review "every" siting decision made by states, including rejections.[26] The following exchange between another subcommittee member and the Deputy Secretary of Energy about interpretation of the legislative language is revealing:

> MR. ALLEN: [A]s I read the transmission provisions, it seems to say that States that say no to a transmission project that the Secretary of Energy considers vital to solve interstate [transmission] congestion areas, will lose their right to say no in the future. ...
>
> MR. McSLARROW: ... I believe that you are correct.[27]

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[24] *Comprehensive National Energy Policy, Hearings Before the H. Comm. on Energy and Committee, Sub. on Energy and Air Quality*, 108th Cong. 13, 59, 67-8, 297, 303 (statements of Reps. Brown, Allen, Boucher, Dingell) (2003).

[25] *Id.*

[26] *Id.* at 13 (statement of Rep. Brown).

[27] *Id.* at 67-8 (statements of Rep. Allen and Dep. Secretary McSlarrow).

This remained the form of federal transmission siting legislation for more than two and a half years.[28] The legislative history of bills with the initial formulation of federal transmission siting language makes plain that Congress intended to authorize FERC to site transmission where states have denied approval. H.R. Rep. No. 108-65, Part I, at 170, 342 (2003). Legislation that included these siting provisions passed the U.S. House of Representative on April 11, 2003.

The form of the siting provisions changed in June 2004, with introduction of H.R. 4503, the "Energy Policy Act of 2004." Energy Policy Act of 2004, 108th Cong. § 1221(a) (2004). This bill was the first measure that used the transmission siting language reflected in section 216, namely "withheld approval for more than 1 year." The legislative history of this bill is sparse, lacking a committee report and relevant House floor debate.

But the intent of the new language becomes clear by comparing it to the earlier version and tracking the changes. In the earlier bill, "withheld approval" unambiguously did not mean "delay approval," since that bill contained a separate authorization for FERC to site transmission where states "delayed final approval." Given that separate authorization, "withheld approval" meant "denial." Previously, the time limitation of "more than 1 year" applied only to

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[28] H.R. 3406, 107th Cong. § 402 (2001); H.R. 6, 108th Cong. § 16012 (2003); H.R. 1644, 108th Cong. § 7012 (2003).

"delaying final approval," not on "withholding approval." The revised language dropped the reference to "delaying final approval" altogether, and moved the time limitation to the "withheld approval" term for the first time.

The most reasonable interpretation is that when Congress struck "delayed final approval" from the new formulation and attached the time limitation to "withheld approval" beginning in June 2004, it did not intend to limit federal siting to circumstances where states had failed to act. For two and a half years, "withheld approval" had *never* meant "delayed final approval" and had consistently meant FERC would be authorized to site transmission where states have denied approval. There is no basis to believe that Congress intended that "withheld approval" in this new formulation would suddenly serve as a synonym for "delayed final approval." If that is what Congress had intended, it would have been a simple matter to strike "withheld approval" instead of "delayed final approval" and use the latter term instead. But that is not what Congress did, and that choice is meaningful. Congress retained "withheld approval," deleted "delayed final approval" and applied the time limitation of the latter to the former. In that light, the conclusion must be drawn that when Congress began to use the term "withheld approval for more than 1 year" Congress intended that "withheld approval" would continue to include denials, but it also intended to expand the meaning of the term to include "delaying final approval," or else applying the time limitation would be nonsensical.

C. Congress Did Not Intend a Nullity.

If the Fourth Circuit's decision is left standing, FERC will have to amend its rule and strip out the provisions that authorize federal siting where states have denied siting approval. Doing so would eliminate most of the preemptive effect in a statute that even the Fourth Circuit recognized was preemptive. *Piedmont,* 558 F.3d at 313. That will entirely change the character of section 216. The end result of the Fourth Circuit decision is that federal transmission siting will become a very unlikely event, restoring the law to the status quo ante that governed before enactment of the Energy Policy Act of 2005, a status quo that Congress found unacceptable and had resolved to change. When engaged in statutory construction "Congress will not be presumed to have done a useless, ineffective, or absurd thing." *Consumers Union of the United States v. Sawhill,* 512 F.2d 1112, 1126 (Em. App. 1975).

Incorrect construction of section 216 by the Fourth Circuit has great national importance. Whatever improvement was made in federal transmission siting by Congress with enactment of the Energy Policy Act of 2005 would be lost under the *Piedmont* decision. By interpreting "withheld approval" to mean FERC can only site transmission when states withhold approval by delaying action, rather than by denying approval, the Fourth Circuit has rendered section 216 useless.

CONCLUSION

The petition for a writ of certiorari should be granted.

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